

(i)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

v.

S. H. KRESS AND COMPANY,

Respondent

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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RELEVANT DOCKET ENTRIES

November 12, 1964—Filed complaint and issued summons.

January 22, 1965—Filed ANSWER of deft.

February 26, 1966—Filed memorandum opinion #32104—deft's motion for summary judgment as to count I of plttf's complaint is denied & plttf permitted to amend count I of complaint as indicated—deft's motion for summary judgment as to Count II is granted—plttf's motion to amend complaint to add a cause of action thereunder is denied—parties will settle order in accordance with the foregoing—Settle order on notice—Bonsal, J. M/N

March 14, 1966—Filed order granting plttf's motion for leave to amend complaint—to be served within 20 days—plttf's cross motion is in all other respects denied—deft's motion for summary judgment as to Count I is denied—as to Count II is granted—So Ordered—Bonsal, J. M/N

March 21, 1966—Filed plttf's amended complaint.

April 26, 1966—Filed plttf's 2nd amended complaint.

May 13, 1966—Filed ANSWER of deft. to second amended complaint.

February 14, 1967—Before Tenney, J. Trial begun. Jury.

February 15, 1967—Trial continued and concluded—Court grants deft's motion pursuant to Rule 50(a) F.R.C.P. and directs verdict in favor of deft.

February 15, 1967—Filed order that deft. Sh. H. Kress & Co. have judgment against plttf dismissing the complaint—Clerk. Mailed notice.

March 15, 1967—Filed plttf's notice of appeal to USCA—mailed copy to Donovan, Leisure, Newton & Irvine on March 15, 1967.

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

SANDRA ADICKES,

Plaintiff,

- against -

CIVIL ACTION NO. 3426

S. H. KRESS AND COMPANY,

Defendant.

JURY DEMANDED

The plaintiff, Sandra Adickes, by her attorneys, Donner & Piel, alleges that:

I.

Jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution and Title 42 United States Code Section 1983.

II.

The matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs.

III.

During all times herein mentioned, plaintiff was and is a citizen of the United States and a resident of the City and State of New York.

IV.

During all times herein mentioned, defendant was and is a corporation duly incorporated under the laws of the State of New York and defendant maintains a store, the purpose of which is to serve the public, in which is located a public lunch counter and booths for eating in the City of Hattiesburg, State of Mississippi.

V.

At all times mentioned herein, plaintiff was a volunteer actively engaged in a movement in the State of Mississippi known as the Mississippi Project, sponsored by the Council of Federated Organizations, a Mississippi voluntary association. Said Council was and is composed of several organizations the purpose of which is to integrate Negro citizens into the political and economic life of Mississippi, to improve the educational opportunities and secure state and federal franchise for such citizens.

VI.

Plaintiff who was and is a White Caucasian high school teacher employed by the New York City Board of Education, volunteered to spend the summer of 1964 in Mississippi. From July 6, 1964, to August 14, 1964, the date of the incidents hereinafter described, plaintiff was a volunteer teacher at a Freedom School located at the Priest Creek Baptist Church in Palmer's Crossing in Hattiesburg, Mississippi.

VII.

On August 14, 1964, at or about twelve o'clock noon, plaintiff accompanied by six Negro students, entered the Hattiesburg Public Library in the City of Hattiesburg, State of Mississippi, a Facility maintained by the taxpayers of the City of Hattiesburg for the use of the public. The Negro students requested the use of the facilities of the library. They were refused the use of such facilities and were thereupon requested to leave by the librarian employed by the Board of Trustees of such public library. Upon the said students' refusal so to do, the librarian called the Chief of Police and he declared the library closed.

VIII.

Thereafter, plaintiff and the Negro students, upon the said Chief of Police' request, left the library and entered the premises of defendant's store in Hattiesburg and sat down a public booth for the purpose of ordering lunch. A wait-

ress employed by defendant and acting in the course of such employment took the orders of the Negro students but refused to take the order of plaintiff or to serve said plaintiff because plaintiff was a Caucasian in the company of Negroes.

IX.

Plaintiff was thereby deprived of the privilege of equal enjoyment of a place of public accommodation by reason of her association with Negroes and was thereby discriminated against because of race in violation of the Constitution of the United States and of Title 42 United States Code, Section 1983.

X.

By reason of defendant's conduct in refusing service to plaintiff wilfully and maliciously, knowing plaintiff was entitled to same, plaintiff was damaged in the sum of \$50,000.

AS A SECOND AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

XI.

Plaintiff realleges the allegations set forth in paragraphs I. through IX. as though set forth again at this point.

XII.

While plaintiff was seated in said booth at defendant's store as aforesaid, an Officer of the Law, acting under instructions of the Chief of Police, entered defendant's said store and observed plaintiff in the company of the Negro students:

XIII.

Upon defendant's refusal to serve plaintiff, plaintiff and the Negro students left defendant's store and went out upon the sidewalk whereupon plaintiff was arrested by the Officer of the Law who had previously entered defendant's store. Plaintiff was taken into custody and charged with the offense of vagrancy. Plaintiff was taken to the City Jail and was held in custody to be released only upon \$100 bail.

XIV.

Upon information and belief, plaintiff alleges that defendant and the Chief of Police of the City of Hattiesburg and his agents conspired together to deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation because she accompanied Negro students to the public library and sought to eat in the company of Negroes in a public place.

XV.

By reason of said conspiracy as aforesaid, defendant through its agents acting jointly with the police officials of the City of Hattiesburg, caused the arrest of plaintiff on the false charge of vagrancy.

XVI.

At the time of plaintiff's said arrest for vagrancy, she was regularly employed in New York City at an annual salary of \$2,200 per year, and she had in her possession in her purse the sum of twenty dollars and eight cents. Plaintiff further had in her possession thirty dollars in Travelers checks and a check book showing a balance of forty-five dollars or more at the First National Bank of Hattiesburg. Plaintiff so advised the arresting officer of such facts, who then knew that plaintiff was not a vagrant who unlawfully, wilfully and knowingly so became by habitually loafing and loitering in idleness on the streets and avenues and in the public places of said City of Hattiesburg the greater portion of her time without regular employment or any visible means of support.

XVII.

By reason of said conspiracy as aforesaid, plaintiff was photographed, fingerprinted and booked as a common criminal in the Hattiesburg police station and was held in custody in a jail cell until released on one hundred dollars bail.

XVIII.

By reason of said conspiracy as aforesaid, plaintiff was and is required to go to court to attempt to secure the dis-

missal of said charges of vagrancy, to travel back and forth to Mississippi from her home in New York and to secure counsel to aid her to her special damage in an amount now unknown to her.

XIX.

By reason of said conspiracy as aforesaid, wherein defendant and the duly constituted authorities of the State of Mississippi jointly wilfully and maliciously sought to deprive plaintiff of her right to aid Negro citizens in their attempt to enjoy the benefits of integrated library facilities, in her desire to be served in a place of public accommodation, and her right to be free from arbitrary and capricious arrest, plaintiff has been damaged in the sum of \$500,000.

WHEREFORE, plaintiff prays:—

- (1) For damages in the sum of \$50,000 for defendant's wilful failure to serve her as above described.
- (2) For special damages in a sum now unknown as described in paragraph XVIII. above.
- (3) For damages in the sum of \$500,000 for defendant's wilful conspiracy with police officials of the City of Hattiesburg to deprive her of her civil rights, under the laws and Constitution of the United States.
- (4) For costs of suit and for such other relief as seem meet and proper to the court in the premises.

[Subscription omitted in printing]

[Caption omitted in printing]

ANSWER OF S. H. KRESS AND COMPANY

Defendant S. H. Kress and Company ("Kress") as and for its answer to the complaint in the above-entitled action:

1. *As to Paragraph I: Denies* the allegations contained therein.
2. *As to Paragraph II: Denies* the allegations contained therein.
3. *As to Paragraph III: Denies* sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein.
4. *As to Paragraph IV: Admits* that Kress maintains a store in Hattiesburg, Mississippi, among many other places which is open to the public and in which is located a lunch counter and booths.
5. *As to Paragraph V: Denies* sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein.
6. *As to Paragraph VI: Denies* sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein.
7. *As to Paragraph VII: Denies* sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein.
8. *As to Paragraph VIII: Denies* the allegations therein.
9. *As to Paragraph IX: Denies* the allegations therein.
10. *As to Paragraph X: Denies* the allegations therein.
11. *As to Paragraph XI: Defendant repeats and realleges* its answers with respect to Paragraphs I through IX of the complaint respectively.
12. *As to Paragraph XII: Denies* Sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein.

13. *As to Paragraph XIII: Denies* sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein.

14. *As to Paragraph XIV: Denies* the allegations therein.

15. *As to Paragraph XV: Denies* the allegations therein.

16. *As to Paragraph XVI: Denies* sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein.

17. *As to Paragraph XVII: Denies* the allegations therein.

18. *As to Paragraph XVIII: Denies* the allegations therein.

19. *As to Paragraph XIX: Denies* the allegations therein.

AS AND FOR AN AFFIRMATIVE DEFENSE

Each purported cause of action in the complaint fails to state a claim upon which relief can be granted.

PRAYER

WHEREFORE, the defendant Kress prays:

1. That plaintiff's requested relief be denied.
2. That judgment be entered dismissing the complaint herein with costs.
3. That defendant have such other and further relief as may be just and proper.

Dated: January 22, 1965.

[Subscription omitted in printing]

[Caption omitted in printing]

ANSWERS TO PLAINTIFF'S INTERROGATORIES

Defendant S. H. Kress & Company (hereinafter referred to as "Kress") answers plaintiff's interrogatories dated April 1, 1965, as follows:

Interrogatory 1:

(a) Gordon T. Powell, Hattiesburg, Mississippi

(b) March, 1963

(c) Inapplicable

(d) <u>NAME</u>	<u>PRESENT RESIDENCE</u>	<u>DATE EMPLOYED</u>
J. A. Baggett*	444 Mable Street Hattiesburg, Miss.	Jan. 25, 1964
N. D. Freeman	Unknown	July 15, 1964
M. E. Jackson	Unknown	Mar. 16, 1964
A. H. Carter	Unknown	Mar. 21, 1964
M. L. Edwards*	Box 327 Hattiesburg, Miss.	May 14, 1964

Asterisk denotes those still employed by Kress.

(i) Pursuant to agreement between the parties the Interrogatory as worded is withdrawn and instead plaintiff seeks the name of the waitress who served the table at which Miss Adickes was seated on August 14, 1964. The name of such person is N. D. Freeman.

(e) 6 booths; 4 tables.

(f) 14.

Interrogatory 3:

No. As of July 4, 1964, it was the policy of Kress not to refuse service to any person on the ground of race, color;

religion or national origin. This policy is in writing and the defendant has a copy thereof.

Interrogatory 7:

C. D. Gentry, District Manager, Meridian, Miss.

(a) With respect to the period July 4, 1964 to August 14, 1964 Kress' Hattiesburg store manager was not required to make any reports concerning the race relations in the store:

(b) With respect to the period from July 4, 1964 to August 14, 1964, no.

Interrogatory 8:

There were no books of instruction or rules or similar writing in effect on August 14, 1964 relating to race relations in Kress stores except as the policy is set forth in a specific policy statement referred to in answer to Interrogatory No. 3.

Interrogatory 9:

There were no books of instructions or rules or similar writing in effect on August 14, 1964 relating to race relations in defendant's Hattiesburg store except as the policy is set forth in a specific policy statement referred to in answer to Interrogatory No. 3.

Interrogatory 10:

There were no books of instructions or rules or similar writing in effect on August 14, 1964 relating to race relations in defendant's stores located in Mississippi except as the policy is set forth in a specific policy statement referred to in answer to Interrogatory No. 3.

Interrogatory 11:

(a) As of August 14, 1964 the policy of Kress was clear as set forth previously and the store manager of the Hattiesburg store was bound by such policy and had no authority to refuse service to anyone on the ground of race, color, religion or national origin.

Interrogatory 12:

With respect to the time period from July 4, 1964 to August 14, 1964, defendant had in its possession, custody or control one writing dated July 15, 1964 to its store managers, including the manager of the Hattiesburg store, setting forth the policy that no person shall be discriminated against on the ground of race, color, religion or national origin.

Interrogatory 13:

With respect to the time period from July 4, 1964 to August 14, 1964, no, except that it was defendant's policy that no person should be refused service on the ground of race, color, religion or national origin.

Interrogatory 14:

With respect to the time period from July 4, 1964 to August 14, 1964, no.

Interrogatory 16:

Yes.

(a) Portions of Mississippi and Alabama; C. D. Gentry.

(b) With respect to the period July 4, 1964 to August 14, 1964, defendant's policy was as previously stated.

[Subscription omitted in printing]

[Jurat omitted in printing]

ANSWERS TO DEFENDANT'S INTERROGATORIES

SANDRA ADICKES, the Plaintiff herein, answers defendant's interrogatories dated August 3, 1965, as follows:

Interrogatory 1. Yes.

(a)(i). 3A Miss. Code 1942 Ann. Section 4065.3; 2A Miss. Code 1942 Ann. Sections 2046.5, 2056(7).

(ii). The defendant refused to serve the plaintiff because she was a white person in the company of Negroes. Plaintiff's conduct in the company of Negroes prompted the defendant to conspire with local police officials to have her arrested and jailed.

Interrogatory 2. Plaintiff has no knowledge at the present time as to whether the defendant was acting under color of any local ordinance.

Interrogatory 3. Plaintiff has no knowledge at the present time as to whether the defendant was acting under color of any regulation other than the statutes set forth above.

Interrogatory 4. Yes.

(a)(i). An inflexible and undeviating custom of segregation and racial discrimination.

(ii). Plaintiff is unable to state at this time whether or not the custom against racial integration of any kind followed in Mississippi constitutes state action and plaintiff has been advised by her attorneys that this is an issue of law beyond her present competence.

(iii). see 1(a)(i) *supra*.

Interrogatory 5. Yes.

(a)(i). see 4(a)(i) *supra*.

(ii). see 4(a)(ii) *supra*.

(iii). see 1(a)(ii) *supra*.

[Subscription omitted in printing]
[Jurat omitted in printing]

DEPOSITION OF SANDRA ADICKES

Deposition of SANDRA ADICKES, the plaintiff, taken by defendant pursuant to notice dated April 26, 1965, and stipulations of adjournment, at the United States Courthouse, Room 601, Foley Square, New York, New York, on Tuesday, May 25, 1965, at 10:30 a.m., before Eugene Wallach, a Certified Shorthand Reporter of the State of New York and a Commissioner of Deeds of the City of New York.

APPEARANCES:

DONNER & PIEL, ESQS.,
Attorneys for Plaintiff,
36 West 44th Street,
New York, New York.

BY: ELEANOR JACKSON PIEL and
SANFORD M. KATZ, ESQ.,
of Counsel.

DONOVAN LEISURE NEWTON & IRVINE, ESQS.,
Attorneys for Defendant,
2 Wall Street,
New York, New York.

BY: JAMES WINTHROW, ESQ.,
SANFORD LITVAK, ESQ., and
ALFRED H. HODDINOTT, JR., ESQ.,
of Counsel.

oOo

IT IS HEREBY STIPULATED AND AGREED by and among the attorneys for the respective parties hereto that the sealing, filing and certification of the transcript of the within deposition be, and the same hereby are, waived; and that said transcript may be signed and sworn to before any Notary Public or Commissioner of Deeds with the same force and effect as if before an officer of this Court:

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, are reserved to the trial of this action.

[3]

SANDRA ADICKES

having been first duly sworn by the Commissioner of Deeds, was examined and testified as follows:

EXAMINATION BY MR. LITVAK:

Q. Miss Adickes, at the outset, do you have any documents with you pursuant to the subpoena that has been served upon you, I believe, on May 18th? A. I brought everything that I had with me, that I have been able to discover.

Q. May I see it, please? A. Yes.

Q. Will you explain to me what this is? For instance, tell me what is this example and then we will mark it. A. This is a communication I received from COFO after the summer, explaining the project.

Q. Do you recall approximately when you might have received it? A. I think it may have been November.

Q. About November 1964? A. Yes.

MR. LITVAK: Mr. Reporter, please mark this document produced by the witness as Defendant's Exhibit 1 for identification.

[4] (Communication from COFO, explaining project was marked Defendant's Exhibit 1 for identification.)

Q. I show you this next document and I ask you to tell me what this is in general? A. This was material I received before the summer. I am not sure whether I got it in the mail or at Memphis. It was to be used as part of our Freedom School curriculum.

Q. From whom did you receive that, do you recall? A. I can't tell you what person sent it to me. It was sent through COFO.

Q. Through COFO? A. Yes.

Q. And you received it either prior to going to Memphis or while at Memphis? A. Yes.

Q. Which would be July 1964, would it? A. The end of June, the first day of July, yes.

Q. To make sure I understand you, this was material to be used as part of the Freedom School; is that correct? A. Yes.

MR. LITVAK: Mr. Reporter, please mark this second document described by the witness as Defendant's Exhibit 2 for identification.

[5] (Material to be used as part of Freedom School curriculum was marked Defendant's Exhibit 2 for identification.

Q. The next document is entitled "Hattiesburg Power Structure." On the second page at the bottom there appears the name Douglas Tuchman. A. Yes.

Q. What is this and who is Douglas Tuchman? A. Douglas Tuchman is one of the volunteers. He is a teacher in Hattiesburg during the summer. This was a result of research he did either by himself or with others.

Q. Do you know when that was done? A. It was done during the summer, I guess; I don't know exactly.

Q. It was given to you by him during the summer? A. Yes.

Q. You say Mr. Tuchman is a teacher. Was he a teacher by profession? A. Yes.

Q. Do you know where he teaches? A. He teaches at Junior High School 99, in Manhattan—at least as far as I know, he teaches there.

[6] Q. Do you know offhand, is this something that was distributed among all the workers in Hattiesburg, the Freedom workers in Hattiesburg? A. Yes, volunteers and students in the Freedom School.

MR. LITVAK: Mr. Reporter, please mark this last document, mimeographed on pink paper, entitled "The Hattiesburg Power Structure," as Defendant's Exhibit 3 for identification.

(Document entitled "The Hattiesburg Power Structure," mimeographed on pink paper, was marked Defendant's Exhibit 3 for identification.)

Q. The next document is entitled "Statistics on Education, Housing, Income and Employment and Health." Could you tell me what that is, please? A. That is the result of research done by the staff of the Council of Federated Organizations during 1964, prior to the summer. It was distributed to the volunteers.

Q. Where; in Hattiesburg? A. No, I received this either in the mail or prior to the summer.

Q. Prior to the summer of 1964? A. Yes.

Q. You wouldn't know offhand who or what group of people prepared this? [7] A. I wouldn't—members of the staff of COFO.

Q. You wouldn't know who they are? A. No.

MR. LITVAK: Will you please mark this paper as Defendant's Exhibit 4 for identification?

(Paper entitled "Statistics on Education, Housing, Income and Employment and Health" was marked Defendant's Exhibit 4 for identification.)

Q. The next document is entitled "Guide to Negro History." A. That also was prepared prior to the summer by the staff of COFO. This was to be used as part of our curriculum of the Freedom School.

Q. One of the teaching tools? A. Yes.

Q. So, again, it is something you received either in Memphis— A. In the mail or at Memphis.

MR. LITVAK: Mr. Reporter, please mark this next document, entitled "Guide to Negro History," Defendant's Exhibit 5 for identification.

(Document, entitled "Guide to Negro History" was marked Defendant's Exhibit 5 for identification.)

[8] Q. The next document appears to be some sort of map. I wonder if you could tell me what it is? A. This was a map drawn up by the volunteers. This is the community where I lived and worked during the summer. The streets in Palmer's Crossing do not have street signs. So we—that is, the volunteers—drew up a map renaming the streets with names that were appropriate to the work we were doing commemorating many names, Negroes, famous abolitionists, and I did a project just for ourselves, for our own information.

Q. Did you participate in that? A. No, I didn't, I didn't draw up that map.

Q. But this was prepared, I presume, earlier during the summer? A. It was during the summer.

MR. LITVAK: Mr. Reporter, please mark the map Defendant's Exhibit 6 for identification.

(Map of Palmer's Crossing was marked Defendant's Exhibit 6 for identification, as of this date.)

THE WITNESS: I just remember, I think I helped to name one street.

Q. One of the streets that appears on there? [9] A. Yes.

Q. The next document is entitled "Mississippi Power Structure". A. Yes, this was also the research work done by the staff of COFO prior to the summer. Again, I received this in the mail or prior to or at Memphis, prior to the summer.

Q. Do you know who prepared this? A. I don't know what individual prepared that, no.

MR. LITVAK: Mr. Reporter, please mark the document entitled "The Mississippi Power Structure" as Defendant's Exhibit 7 for identification.

(Document entitled "Mississippi Power Structure was marked Defendant's Exhibit No. 7 for identification, as of this date.)

Q. The next document is entitled "Palmer's Crossing, Freedom News". It appears to be dated July 23, 1964.

A. That is a newspaper prepared by the students of the school where I taught.

Q. Were you involved in the preparation of it? A. Only to the extent that I encouraged the students to write for the newspaper.

[10] Q. Were you involved in any sort of editorial capacity? A. No.

Q. Do you know the students who did that? A. Yes, I did.

Q. Do you know which of your students wrote the paper? A. I can identify some of the students as mine. However, they may have written this in a class—what they have written here they may have written in a class that I was teaching.

MR. LITVAK: Mr. Reporter, please mark this paper headed "Palmer's Crossing Freedom News" as Defendant's Exhibit 8 for identification.

(Paper headed "Palmer's Crossing Freedom News" was marked Defendant's Exhibit 8 for identification, as of this date.)

Q. Can you tell me what the next document is? A. This is something I received, again, from COFO. I don't know—I am not sure when I received it.

Q. You mean you are not sure whether you received it before you went to Mississippi or after your return? A. I am not, no. I don't think I received it before the summer. [11] It would seem to indicate from the contents that it is something that came during the summer—that it was something that was during the summer, so I probably received it after the summer.

Q. After the summer? A. Yes.

Q. It is entitled "Freedom School Data"? A. Yes, sir.

MR. LITVAK: Mr. Reporter, please mark this document just described by the witness as Defendant's Exhibit 9 for identification.

(Document entitled "Freedom School Data" was marked Defendant's Exhibit 9 for identification, as of this date.)

Q. The next document appears to be entitled "Books and Films needed for Mississippi Libraries". Can you tell me who prepared that? A. I am not sure whether this was prepared in Mississippi or in New York, whether it was prepared by COFO or SNCC. I am really not sure who prepared this.

Q. Do you know about when it was prepared? A. I believe it was prepared before the summer. I received it sometime during the summer.

Q. Sometime during the summer? [12] A. Yes.

MR. LITVAK: Mr. Reporter, please mark this paper just described by the witness as Defendant's Exhibit 10 for identification.

(Document entitled "Books and Films needed for Mississippi Libraries" was marked Defendant's Exhibit 10 for identification.)

Q. You have here two editions of the Hattiesburg American, one dated Friday, August 14, 1964? A. Yes.

MR. LITVAK: Mr. Reporter, please mark that paper Defendant's Exhibit 11 for identification.

(Paper, Hattiesburg American, dated Friday, August 14, 1964, was marked Defendant's Exhibit 11 for identification, as of this date.)

MR. LITVAK: A copy of the Hattiesburg American, dated Monday, August 17, 1964, Mr. Reporter, please mark this newspaper Defendant's Exhibit 12 for identification.

(Newspaper, Hattiesburg American, dated Monday, August 17, 1964, was marked Defendant's Exhibit 12 for identification, as of this date.)

Q. I assume that you have no other editions of the Hattiesburg newspaper? [13] A. I don't believe I have, no.

Q. Do you have a copy of the bail receipt? A. Yes, I do.

Q. May I see it, please? A. Yes.

MR. LITVAK: Mr. Reporter, please mark what appears to be a bail receipt, No. 2175B from the City of Hattiesburg Police Department for \$100, made out to Sandra Adickes and dated 8-14-64. Please mark it Exhibit 13 for identification.

(Bail receipt, No. 2175B from the City of Hattiesburg Police Department for \$100, made out to Sandra Adickes, dated 8-14-64, was marked Defendant's Exhibit 13 for identification, as of this date.)

Q. Are there any other writings of any sort which you prepared or were prepared for your signature which relate in any way to the incident on August 14, 1964? A. No. To my knowledge, I have nothing.

Q. Did you sign any statements relating to the incident of August 14, 1964? A. Just in preparation for the litigation.

Q. In preparation for the litigation—for [14] Mrs. Piel, you mean? A. Yes.

Q. Anything which was filed in connection with any litigation in Mississippi or elsewhere? A. I don't think so. I filed an affidavit in Mississippi.

Q. Do you have a copy of that affidavit? A. No, I don't.

Q. Will you furnish us with one?

MRS. PIEL: We will.

Q. Are there any other papers that you can recall now?

A. No.

Q. Miss Adickes, can you tell us a little something about your educational background? A. I have a Bachelor's Degree from Douglass College, major in English; and I have a Master's Degree from Hunter College with a major in English.

Q. What year did you receive your degree? A. I received my Bachelor's Degree in 1954 and my Master's Degree in 1964.

Q. How long have you been teaching? A. Five years.

Q. Since 1960? [15] A. Yes.

Q. On your graduation from college in 1954, did you work after that? A. Yes.

Q. Can you tell me where? A. I worked in an advertising agency for a while and I worked as an actress for a number of years.

Q. After you graduated, what was the first job you held after that?

MRS. PIEL: I believe you are going into things that are irrelevant to the cause of action. I don't have objections to general questions about education, but if you are going into everything she did, starting back in 1954, I believe that is a little too much. I will object to it and instruct the witness not to answer.

MR. LITVAK: So it is clear, I don't intend to go into everything she did back to 1954. I do intend to ascertain what her employment experience was and what she had done, because I think it has a bearing on this case, what her damager might be.

MRS. PIEL: What is the bearing?

MR. LITVAK: It would seem to us it might [16] well be relevant—and I don't know the answers to the questions—depending on what Miss Adickes did during that time period, what jobs she held, what experience she had of suing among

other things as I understand, for humiliation. Humiliation is a relative thing. To measure that, you would have to know a person's prior experience and what humiliates one person will not humiliate another.

MRS. PIEL: She has testified what she did, and I think to go into a detailed history of this witness at this time is irrelevant and I will object and instruct the witness not to answer.

MR. LITVAK: We will save the objections for a while and see how we go. We may have to get rulings on them now, but we will see how far we can go.

MRS. PIEL: All right.

BY MR. LITVAK:

Q. When you started to teach in 1960, I assume that was in New York? A. Yes.

Q. In the public school system? A. That is right.

Q. Prior to 1960 had you been involved in any [17] civil rights activities whatsoever? A. No.

Q. Where did you start teaching in 1960? A. At Yorkville Vocational High School, in Manhattan.

Q. How long were you there? A. I was there one year.

Q. And then Benjamin Franklin High School? A. Yes.

Q. And you have been there ever since? A. Yes.

Q. You are still teaching there? A. That is right.

Q. Have you taught English all this time—is that right?

A. Yes.

Q. Are you a member of any civil rights organization?

A. No.

Q. Have you ever been a member of any civil rights organization? A. Civil rights organizations don't usually have memberships. I have never held any memberships, I have contributed money.

Q. You are not a member, for example of the [18] NAACP? A. No.

Q. To which organizations have you contributed money, civil rights organizations? A. The NAACP, SNCC, CORE, SCLC.

Q. Will you tell me when you first started contributing

money to these organizations? A. I don't remember exactly.

Q. Can you tell me approximately the year? A. It may have been in 1960.

Q. 1960? A. Yes.

Q. Did you in 1960 or thereabouts participate in any civil rights activity other than the contribution of money? A. I don't believe I did, no.

Q. When is the first time you recall participating in any civil rights activities? A. I think it was when I went to Prince Edward County, Virginia, and taught Freedom School during the summer of 1963. I believe that was my first activity. There may have been others, but I don't recall at this time having participated in any prior to that time.

Q. Had you attended any meetings prior to that [19] time, meetings of civil rights organizations? A. The only meetings I attended prior to going to Prince Edward County, Virginia, were meetings in preparation for going to Prince Edward County, Virginia, how we would teach, set up the schools and so forth.

Q. Under whose auspices was the Prince Edward program? A. Under the auspices of the United Federation of Teachers.

Q. Are you a member of the United Federation of Teachers? A. I am.

Q. Have you been a member of that since 1960? A. No, I believe I have been a member of that since 1962.

Q. Did I understand you to say that you had some sort of training prior to going into the Prince Edward County school? A. We had meetings in New York City prior to going to Prince Edward County.

Q. And you received some sort of instructions during those meetings; is that correct? A. Yes.

Q. Who conducted those meetings? [20] A. I believe in the main they were conducted by a Richard Parrish, who was an officer of the American Federation of Teachers.

Q. That is different from the United Federation— A. That is the national organization. The UFT is the local organization.

Q. Mr. Parrish is in New York or is he from New York, do you know? A. Yes, I believe he is.

Q. Is he a school teacher in New York? A. He has been. I don't know if he presently is a school teacher. He is still an officer of our union.

Q. A local union? A. He is an officer of both—I believe of the local and the national union.

Q. How long did you attend this lecture in the school, or what have you, preparatory to going to Prince Edward County? A. There may have been two, three or four meetings, several hours in length each.

Q. Several hours each? A. Yes.

Q. And this was when? A. In the summer of 1963.

[21] Q. Do you recall whether it was June or July? A. It was June and July, yes.

Q. Can you tell us, were you furnished with any written materials at these meetings? A. I don't believe I was.

Q. Did Mr. Parrish do most of the lecturing himself? A. He conducted the meetings. We would have discussions and work sessions.

Q. About how many were there in a group? A. I believe about 40 people went down altogether to Prince Edward County, but I don't believe they were all ever together at the same meeting.

Q. But there were 40 from New York who attended various meetings? A. Yes.

Q. Can you tell us the substance of those meetings, generally what the discussions were about, what transpired at the meetings? A. Mr. Parrish had been in contact with a minister in the community there and he informed us as to the nature of the community—he made several trips down also—the nature of the community, the position of the people in the community, the school situation, the [22] educational condition of the students we were to teach.

Q. What did he tell you with regard to the nature of the community, do you recall? A. I don't recall too much about what he said, no. I think greatest emphasis was given to the damaged educational condition of the students, be-

cause they had been out of school for four years at the time.

Q. Did he describe to you what your function was? A. Yes, but I don't remember specifically what he said, or what other people said at that time.

Q. Can you tell me the general substance of what your function was to be there? A. That I was to be teaching young children, that they were rural children, we would have—there were regional differences in speech. Some of them had started school prior to the closing of the schools and therefore would be in greater damaged condition than those who had never been to school at all, and we should be aware of this and try to prepare materials that could reach these children in particular. Patience was stressed. The human qualities, the human quality of our teaching was emphasized.

[23] Q. Did you discuss where you were going to be living? A. Yes, the homes, we would be living in the homes of the people of the community.

Q. People in the Negro community? A. Yes, in the Negro community.

Q. Were the attitudes of any of the white people discussed? A. Yes, that was discussed also.

Q. What was said in that regard, do you recall? A. That they were hostile.

Q. Did you discuss in any way any other civil rights activity other than teaching? A. No, we were specifically instructed not to participate in other civil rights activities.

Q. Were you instructed to stay out of town? A. We were in town. We could not stay out of town, but we were encouraged to stay in our own—that is, in the Negro section of the town.

Q. I was going to say, it is set aside, the Negro community is set aside? A. It is segregated, yes.

Q. And were you told to stay within the confines of that? [24] A. We were not instructed, but we were encouraged—for our own safety, to stay within the Negro community.

Q. How long were you in Prince Edward County? A. I was there about two-and-a-half weeks.

Q. Was that the anticipated tenure at the time you went?

A. No, I had expected to be there for a month. I went in August, and I had expected to be there through August, but they closed the school somewhat earlier than they had planned because of the march on Washington.

Q. So you left there at the end of the two-week period?

A. Yes, and I went back to New York.

Q. Did you participate in the march on Washington? A. I did.

Q. During the time that you were in Prince Edward County, were you personally involved in any incidents concerning any civil rights activity or teaching or hostile activity on the part of the town's people?

MR. KATZ: That is a broad question, Mr. Litvak. Why don't you break it down?

MR. LITVAK: I can break it down.

MR. KATZ: I hope you will be getting to the [25] locale of Mississippi, in the year 1964.

Q. Were you personally involved in any incident arising out of any civil rights activities which you or others participated in? A. There were incidents, but not because of civil rights activities.

Q. What were they because of? A. Because of our presence.

Q. What types of incidents? A. There were threats to members of the group. We went into Richmond one weekend because we had heard that the restaurants in Richmond were integrated, or that Richmond was integrated. We went to the Museum of Fine Arts and we went to have dinner afterwards, believing that all the restaurants in Richmond were integrated. We had not planned to sit in or demonstrate. We went to a restaurant and the group was integrated, we were refused service.

Q. What restaurant was that? A. I don't remember the name. It was a Chinese restaurant. We left and two plainclothes policemen followed us in a car. [26] We attempted to go to another Chinese restaurant and the plainclothes policemen followed us and came into the restaurant after

us and instructed the proprietor not to serve us. We were followed by this car. Threats were made to members of the group.

Q. In your presence? A. Yes.

Q. Not to you personally but to others? A. Yes, to me personally.

Q. To you personally, too. A. Yes.

Q. Threats by whom, by the police? A. By the plainclothes men.

Q. At the original restaurant you were merely refused service? A. Yes.

Q. Did the plainclothes men come in to the restaurant? A. They were in the restaurant when we were in; we didn't know this.

Q. When did you realize they were plainclothes men? A. When we went to a police car and we heard the men [27] who had followed us talking to the policemen at the police car and the policemen informed—that is, the uniformed policemen informed the members of our group that those were plainclothes men.

Q. When you asked and you were refused service, I guess you just got up and left? A. Yes.

Q. And when you went to the second restaurant, and the plainclothes men followed you— A. Yes, the proprietor was prepared to serve us, but when the plainclothes men came in and instructed him not to serve us, he refused.

Q. You were all seated at that time? A. Yes, we were.

Q. These insults by the police, were they made to you in the restaurant? A. Outside the restaurant.

Q. Was anyone present? A. I don't remember who it was—this was outside, the remarks, the threats were made outside.

Q. What sort of threats? A. I don't remember the exact wording. It was something to do with—something might happen to us if we stayed there. [28] I believe reference was made to the way—to automobiles or something like that. I do not remember the exact wording, but something to do with cars drive very fast here. You better get out of town.

Q. Were these students of your that you were with? A. No, these were volunteers.

Q. Volunteer teachers? A. Yes.

Q. It was an integrated group? A. It was an integrated group.

Q. How large a group was it? A. There were eleven people.

Q. After this conversation with the police officers, did you just leave and go back to your community? A. After—well, it wasn't a conversation. After our encounter with the police, we went to—we went outside of Richmond. They followed us outside of Richmond. We stopped at a place—one of the Hot Shoppe chains because we knew they were integrated, we knew for certain they were integrated, and we were served [28-A] there, and after eating we proceeded back to Farmville, Virginia.

[29] Q. Which is where you were living? A. That's right, that is the County seat of Prince Edward County.

Q. Did you have any other such experiences while in Prince Edward County? A. No, outside of what I have said about insults.

Q. Were these to you personally? A. To members of the group.

Q. In your presence? A. Yes, yes—to all of us.

Q. Where would this be, where did this happen? A. This would be the street, outside the church, different places.

Q. Were the white people in the immediate local vicinity? A. No, they drove through.

Q. It would be while they were driving through the Negro portion of the town, do you mean? A. Yes, that's right.

Q. Do you recall any threats being made? A. No, not—I know that threats were made, but not in my presence.

Q. You heard them being made to others in the group? [30] A. Yes.

Q. Is that correct? A. Yes.

Q. Were any of the members of your group in Prince Edward people who were later with you in Hattiesburg? A. No, no one from Prince Edward County was in Hattiesburg with me.

Q. Were any of the members of the Prince Edward Group arrested at any time? A. I have the feeling that a number of them were, but I can't tell you where and what incidents—whether they were arrested.

Q. Not in your presence, at least? A. No.

Q. But your overall impression is that you recall some may have been arrested? A. One or two may have been arrested; I'm not sure where.

Q. You came back to New York in about the middle of August? A. Toward the end of August.

Q. Toward the end of August? A. A few days before the 28th, before the March on Washington.

[31] Q. And you subsequently participated in that? A. That's right.

Q. In the March on Washington? A. Yes.

Q. Did you stay in Washington? A. Just for the day.

Q. You came back to New York? A. That's right.

Q. By the way, did you receive any pay while in Prince Edward County, any compensation of any sort, monetary? A. No, this is volunteer work.

Q. What about subsistence? A. Funds had been collected. We had asked for contributions—we were paying members of the community for our room and board and members of the union contributed funds to maintain us there.

Q. This is prior to your going? A. Yes.

Q. You had contributed such funds, I gather? A. Yes—I think I did. I had expenditures, yes.

Q. This is from the United Federation of Teachers? A. Members of the union, yes.

Q. Was it a special collection for the purpose? [32] A. Yes.

Q. Not from the general treasury? A. That's right.

Q. From the time of your return to New York in or about the beginning of September, 1963, did you participate in any further civil rights activities prior to the summer of 1964? A. Only in preparation for the summer of 1964.

Q. Did you attend any meetings other than the preparation for the summer of 1964, let's say from September, 1963,

up through April, 1964? A. No. Well, March, in March—I would say it was about in January that we began planning for the summer.

Q. Between September and January, then, you don't recall any meetings? A. No, I don't.

Q. Or any activities in particular? A. No.

Q. You say in January you started planning for the summer of 1964? A. Yes.

Q. Will you tell us what you did in January? A. I worked with another member of the union, a teacher. We had both participated in Prince Edward County. At [33] that time we thought that we would want to do something the following summer of the same nature, that is, teach in Freedom Schools. About that time also we were in contact with a member of COFO who told us that they would be setting up Freedom Schools in the summer, and that they would want teachers to come down and teach in the Freedom Schools.

So we began having meetings and preparing to ask the union to support this project, to go about soliciting volunteers and funds to support the volunteers for Mississippi, to plan curricula, and to obtain teaching materials for the summer in Mississippi.

There were meetings between other members of the union and myself, officers of the union and those of us who wished to sponsor the project, people in COFO. There was a curriculum conference in March 1964 where teachers, college professors and so forth, and COFO staff got together to plan the curriculum for Freedom Schools for the summer.

Q. Let's go back to January. Who was the person with whom you spoke? A. Mrs. Norma Becker.

Q. Do you know what her address is? [34] A. 30 East 9th Street.

Q. She is a teacher here in New York? A. Yes, she is.

Q. Where does she teach? A. Junior High School 43, Manhattan.

Q. You and she had gone down to Prince Edward to

gether; is that correct? A. We had not gone down together. We had both been there and met in Prince Edward County, and we had seen each other since, and the idea occurred to us that we would like to sponsor, or work in a project like this again during the summer of 1964.

Q. Had she been a member of this group that had gone to the Chinese restaurant in Richmond? A. No, she had not.

Q. You first started discussing this with Mrs. Becker in about January, 1964? A. That's right.

Q. Were you aware at that time as to whether there were going to be any such school? A. We were told there would be Freedom Schools in the summer.

Q. By whom were you told that? A. I had received a letter, I believe—I am not sure [35] of the first person—I am not sure who the first person was who told me—I can't remember the name now. At the moment the name of the girl escapes me, who first contacted me about it.

Q. When you think of it, will you let us know? Do you recall if she was a member of some organization? A. Yes, she was a member of COFO.

Q. Can you tell me, if you know, when was COFO established? A. I think it was established in November, 1963, but I can't be positive about that.

Q. Does COFO, to your knowledge, have any officers? A. They may have, but I never paid—I really don't know who they are.

Q. Was this girl whose name you don't recall a member? A. She was a member of the staff.

Q. A member of the staff of COFO? A. Yes, her name is—no, I am thinking of somebody else. I thought I remembered her name, but I have forgotten.

Q. How large a staff did COFO have at that time, [36] do you know? A. I don't know how many people there were.

Q. Do you know where COFO headquarters were located? A. In Jackson, Mississippi.

Q. Was your contact with COFO of a long distance nature? In other words, were you communicating with Jack-

son, Mississippi? A. No—just occasionally. We saw them when they came up to the conference in March.

Q. In January, though, you were advised by the young lady that they were going to have Freedom Schools? A. Yes. It may have been—I am not sure whether she advised me in January or somebody else told me in January. It was about that time.

Q. Did you request at that time or receive at that time, any information concerning COFO itself, about what it was?

A. Yes. They told us that it was an amalgam of the NAACP, CORE, SNCC and SCLC, and they told us that they were—that many of the people had been in Mississippi through SNCC or CORE, and they were planning a massive summer project.

Q. They had been to Mississippi, I presume, in [37] the summer of 1963? A. I believe they all were, yes.

Q. You say that you and Miss Becker, I believe, talked with some of the people in the union to get them to aid in sponsoring of this? A. That is correct.

Q. To whom did you talk? A. We talked to a number of people, among them Sid Harris, Mr. Al Shanker, the president of the union, and we addressed the executive board and asked for their approval.

Q. Is Mr. Harris a New Yorker? A. Yes.

Q. Will you tell me his address? A. I don't know.

Q. Is he a teacher? A. Yes, he is.

Q. Where does he teach? A. I don't know where he is teaching.

Q. What is his position with the union? A. He is an officer. I am not sure exactly what his office is.

Q. Did you and Mrs. Becker approach him together? A. We approached him through a committee. He was a [38] member of the Human Relations Committee; we were too.

Q. When had you become a member of the Human Relations Committee? A. The Human Relations Committee was—had sort of mounted the project, the Prince Edward County project, and we continued our activities through the Human Relations Committee.

Q. What other activities of the Human Relations Committee were involved other than Prince Edward? A. School matters in New York—matters of human relations in New York City.

Q. Can you be more specific? A. I wasn't attending meetings between the meetings that prepared the Prince Edward County and until we decided to work on this project in Mississippi. We went to a Human Relations Committee meeting, then, and then we brought there the specific idea.

Q. In other words, between June and January you hadn't attended any meetings of this committee— A. Between September—well, I will say that, yes.

Q. And Mr. Harris was a member of the committee? A. Yes.

Q. And were you a member of the committee? A. Yes.

[39] Q. And Mrs. Becker was a member of the committee? A. Yes. By member of the committee, we were not in regular attendance.

Q. Yes, but there is a regular composition, isn't there? A. It varies, the membership fluctuates, some come and some don't come.

Q. How many members are there? A. I don't have any idea what the total membership is. As I say, it varies, some people come for a while and some drop out, and so on.

Q. There is a chairman of the committee? A. Yes.

Q. And Mr. Harris is the chairman? A. Yes.

Q. How often does the committee meet? A. It meets twice a month, I believe.

Q. Do you know where? A. It meets at the union headquarters.

Q. Where is that? A. 300 Park Avenue South.

Q. Did you and Mrs. Becker first approach Mr. Harris outside of committee meetings? A. No, it was in committee meetings.

[40] Q. It was formally brought up, so to speak? A. Yes, and there were members—there were a couple of people from COFO there to also speak on this project.

Q. You had arranged to have them present? A. They

wanted to come, so we informed them when the meeting would be and they came.

Q. Who were these people? A. One is named Ivanhoe Donaldson.

Q. And the other? A. I can't remember the other young man's name.

Q. Where were these gentlemen from, do you recall? A. I don't know where Ivanhoe is from originally—I know he went to school in New York, and he went to Michigan, but I don't know where he was born.

Q. Where are they most immediately from? Did he reside in New York at that time? A. The other young man did, but I don't remember his name. Ivanhoe has been in the south, he has been a SNCC worker for about three or four years now.

Q. He had come up from the south? A. Yes.

Q. Do you know where in the south? A. He is all over the south. He has worked in Mississippi; he has worked in Alabama; he has worked [41] in Virginia; he has worked in Georgia.

Q. Is he a teacher? A. No.

Q. What does he do there? A. Well, he is a project director for SNCC. He has been involved in voter registration, or whatever project the community—is determined that the community needs at the time.

Q. Is he a paid employee? A. I think his salary is something like \$10 a week.

Q. And as far as you know, that is his only job? A. Yes.

Q. When and how did you first meet him? A. I met him in Prince Edward County.

Q. He was in Prince Edward County at the time you were there? A. Yes.

Q. And he originally recruited you to go there? A. No, no, just met him there.

Q. You just met him there? A. Yes.

Q. He was not teaching there? A. No.

Q. Did he spend the summer there? [42] A. He just spent some time there while we were there.

Q. And this other gentleman whose name you don't recall? A. I had not met him prior to—I think I had some contact with him at SNCC. He worked for SNCC, and I had some prior contact with him before this meeting at the union.

Q. Do you mean shortly before? A. Yes, yes.

Q. Is Mr. Donaldson one of the people who originally contacted you, or whom you contacted in connection with the summer of 1964? A. He was one of the people who spoke to us about it. I remember conversations with him about the summer of 1964, and they took place in February—January and February, 1964.

Q. Did you invite Mr. Donaldson to come to this meeting? Did you tell him about it and invite him to come? A. I think Mrs. Becker was in contact with him.

Q. Do you know who invited the other gentleman? A. Well, I know it was their idea to come; they wanted us to participate. So it was more a matter of mutually arranging it rather than extending an invitation to [43] someone.

Q. And the United Federation of Teachers— A. Norma Becker and I who were principally interested in the teaching project in Mississippi.

Q. As I understand it, now you were trying to interest the United Federation of Teachers in supporting this in some way? A. Yes, that's right.

Q. Was this meeting specifically called for the purpose of discussing— A. No, it was a regular meeting, but we had places on the agenda.

Q. There was a formal agenda to these meetings? A. Well, it is not that formal, but there is an agenda.

Q. Which is prepared by whom, do you know? A. By members of the committee. If you have something placed on the agenda, at the prior meeting you go to the committee chairman.

Q. Mr. Harris? A. That's right.

Q. Is that the way you placed this on the agenda, do you recall? A. I forget now. I think we attended a prior meeting and asked to have it placed on the agenda.

[44] Q. Are there minutes of the meetings, do you recall? A. Sometimes there are. I don't know if there were minutes taken at this meeting. There may be, and if there are, they are in the union headquarters.

Q. You don't have them, at any rate? A. No, I don't.

Q. Can you tell us what was said by Mr. Donaldson at this meeting? A. He was explaining the plans for the summer, and I really cannot remember all the details. The other young man spoke too and I can't recall either. He just outlined the plans for the summer, and by that time I was totally familiar with what they were planning to do, so I didn't even listen.

Q. Did you say anything, do you recall? A. I don't believe I did, no.

Q. How about Mrs. Becker? A. Mrs. Becker may have spoken; I'm not sure. I may have said something in support of it; I probably did. But I don't remember what I said.

Q. It is not clear to me—what is it that you were asking the United Federation of Teachers to do? A. I was first asking the Human Relations Committee to [45] support the sponsorship of the union of this project, that is, the Freedom School project in Mississippi in 1964. And the Human Relations Committee would then place it before the executive board and we would then appear before the executive board to speak for this proposal, and that is exactly what happened. The Human Relations Committee did support—approve the project and we did appear before the executive board and the union did sponsor the project.

Q. What does it mean when you sponsor the project—just say, "We support it"? A. Yes, that is right, and a subcommittee was set up of Mrs. Becker and me. We wrote for the union newspaper explaining what we were going to do. We sent out applications and we answered inquiries from teachers interested in participating, and we solicited funds for the school, under the auspices of the union.

Q. May I get back at this meeting in January, of the Human Relations Committee— A. It may have been in February, some time in the winter.

Q. January or February, as you recall? A. Yes.

Q. Were there any questions asked that you can [46] recall? A. I don't remember what was said.

Q. Do you remember anyone voicing any concern about the project? A. I remember the consensus—I think most of the people were in favor of it. There may have been some objections raised, but I don't remember who raised them or what was said.

Q. You don't remember the nature of the objections, if there were any? A. No, I don't.

Q. Did the committee take a vote on this? A. Yes, and they voted to support it.

Q. Do you know what the vote was? A. I can't remember that.

Q. If there were minutes, I guess it would be reflected in the minutes? A. Yes, yes. If there are minutes of this meeting, yes.

Q. That would be a vote to recommend to the executive committee of the union that it support your summer project? A. Yes, that's right. There may have been some question, because [47] these questions came up a number of times. There may have been questions about whether this was primarily a civil rights project, or primarily a teachers' project, and it was emphasized that this was primarily a teachers' project.

Q. Do you recall any discussions about the civil rights aspect of it as distinguished from the teaching aspect of it? A. I don't remember—I know these discussions came up a number of times, but I don't remember specifically who raised the question or what was said; I don't remember that.

Q. Did you attend an executive committee meeting? A. Yes, I did.

Q. Did Mrs. Becker attend? A. Yes, she did.

Q. How about the other two gentlemen? A. No, they weren't there.

Q. Anyone else from SNCC or COFO? A. No.

Q. And you presented this proposition to the board; is that correct? A. Yes.

Q. Was Mr. Harris present? [48] A. No, he was not.

Q. He is not a member of the executive board? A. I am not sure. I am not clear on the relationship. He was not at that meeting. I don't remember if at that time he was a member of the executive board or not; I don't know.

Q. Do you recall who the members were of the executive committee at that time? A. I only remember a number of them. This is a matter of record at the union headquarters.

Q. Can you tell us whom you recall? A. I remember a man named George Altomare. I remember a man named Martin Loebenthal. I remember Charles Cogen was then president of our union, and he was there. I remember Al Shanker was there, and I remember that a woman named Goldie Colodny was there. There were other people there but I don't remember who else was there.

Q. Do you remember any of the discussions at that meeting? A. There was a discussion about money, how we would raise it—there was a discussion about that, and how it would be used.

Q. Can you tell me the substance of what was [49] said about how you raised it? A. The ways of eliciting funds from the union members, how we could get their support. This meeting went on for some time, so this may have gone on—this final meeting may have taken place in March or April. I'm not sure; this all took place over a period of months—from the inception of the planning for the summer program and the final—our share went on from January until we finally went down there and I am not clear as to exactly when all these meetings took place. I know it started in January—we had preliminary meetings in January and February and March, and so forth. When final approval came, I don't know. It may have been later in the spring that final approval came and then there was discussion about how we were to raise money and get teachers to participate in the project.

Q. How was it finally decided to raise money? A. It was decided, I believe, that we would send out sheets, flyers,

to the schools and ask the union chapter chairman to solicit funds from the United Federation of Teachers members in the schools, ask people to sign them and place the amount next to them.

[50] Q. Were these donations? A. Yes, donations. These were for supplies, for our transportation and sustenance while in Mississippi, and also to pay for rented cars?

Q. Rented cars for what purpose? A. Well, because we would be in rural areas, and transportation would be a problem, getting us to the school, around and so forth.

Q. During this period of time from January to March or April, were you in contact with other members of COFO? A. I am sure I was, but I can't remember—I remember I was in contact with a girl named Penny Patch. I was trying to remember the name of the other girl that I was in contact with. It has not yet come to me.

Q. Miss Patch was who? A. A COFO worker.

Q. In New York? A. No, she was in Mississippi.

Q. Did you understand that there were any other similar groups, similar to yours, in any other cities? A. It was my understanding that we were the only teachers group that would be participating as a group in the Mississippi Summer Project.

[51] Q. What did you understand at this time the summer project was? A. My understanding was that the aims of the summer project would be to break down the barriers that presently existed in Mississippi and elsewhere—but let's say most emphatically in Mississippi, which prevented Negro citizens from participating in the full life of citizenship in this country. And that the aims of the project would be voter registration, getting the adult members of the community registered to vote; that there would be an attempt to set up community centers to engage them into some kind of social life in the community, social educational—the adult members—social, educational and recreational activities; and that this third prong of the summer program would be Freedom Schools, which would be directed primarily at the young people, students. It had been intended that these

schools would be set up primarily for high school students between the tenth and twelfth years.

So we set about utilizing our own experience and these were whom we were in contact with, to construct a curriculum that would be appropriate to rural Negro students in segregated states.

[52] Q. So this was a three-pronged program? A. Yes.

Q. And you were involved in the third prong? A. In the third prong, yes.

MR. LITVAK: Shall we take a short recess?

(Whereupon, a short recess was taken, after which the proceedings continued as follows:)

BY MR. LITVAK:

Q. I think you mentioned, Miss Adickes, that you eventually ran some sort of notice or put some article in the union newspaper relating to the proposed project during the summer? A. Yes.

Q. Do you have any copies of those newspapers? A. No, but I think I can get copies of them.

Q. I would appreciate it. A. Very well.

Q. When did you begin, and by you, I mean the United Federation of Teachers, collecting money for the summer of 1964? A. It was in April or May.

Q. And the collection continued through June; is that right? A. Yes.

[53] Q. This was used to send the people to Mississippi and support them while there? A. Yes, to purchase supplies and also to pay for the rented cars.

Q. What about the recruitment of teachers for the project? A. That was done through the union newspaper.

Q. Were you involved in writing some article or something? A. Yes. I did write an article—a number of articles appeared that our editor—we gave materials to our editor explaining this project and putting in a little slip or telling people how to get in touch with us. I wrote an article after a trip we made to Mississippi early in June, 1964.

Q. When did you make the trip? A. In June.

Q. Early in— A. Early in June, 1964.

Q. Who made the trip? A. Mrs. Becker and I went down to Mississippi to find out what the situation would be for the summer, where schools would be, and where our—where the teachers would be placed, and so forth.

[54] Q. Where in Mississippi did you go? A. I went to Jackson, Mississippi, and we also made a trip to Vicksburg, Mississippi.

Q. Was that your first trip to Mississippi? A. That's right.

Q. Was that your first trip to Mississippi? A. That's right.

Q. Did you meet anyone in Mississippi when you arrived there? A. Yes, we went—we were the COFO people, we were COFO—

Q. You went with them or met— A. We stayed with them. They came to the airport and picked us up and we met with them during the course of the weekend.

Q. This was a weekend? A. Yes.

Q. Which COFO people did you meet? A. We spoke with Penny Patch, with Ivanhoe Donaldson, and this girl whose name escapes me at the moment—but I will refresh my memory later.

Q. Who paid for this trip? A. We paid for it, Mrs. Becker and I, personally, and we did later get half our plane fare refunded to us.

Q. By whom? A. It came out of the funds that were collected.

[55] Q. The money that was collected from the union members? A. Yes, that's right.

Q. You each got half? A. Yes.

Q. Was there a meeting arranged in Jackson which you were going to attend? A. There was no specific meeting. We had meetings because we were there and people were there, and we spoke about the Freedom School.

Q. Did you discuss the schools and where they would be located? A. That's right.

Q. Where did you propose to locate the various schools? A. We asked them for information as to the most viable situations for schools.

Q. What do you mean by the most viable situations? A. Where there would be a physical facility for it, where there would not be too much danger, where there was a desire on the part of the people to have a school, and where there was a school population to attend these schools. Also on the way back from Mississippi, we [56] stopped in Atlanta, Georgia; we made a plane stop back and spoke to Staughton Lynd, who was the head of the Freedom School project in Mississippi. He was going to head the Freedom School project during the summer.

Q. Where did you meet him? A. We had both met him in March, 1964, at the curriculum conference that was held in New York.

Q. What is this curriculum conference? A. I mentioned earlier, this was where members of COFO and Mrs. Becker and myself and other interested parties got together to plan the curriculum for the Freedom School in the summer of 1964.

Q. And at that time you met Mr. Lynd? A. That's right.

Q. And were told he was going to be in charge of it? A. Yes.

Q. Who determined that? A. COFO. I don't know how they determined it. They have a rather unstructured way of doing things, so I don't know who determined it.

Q. Is Mr. Lynd a teacher? A. He is a professor of American history at Yale University.

[57] Q. At Yale? A. Yes.

Q. He was in Atlanta during this time period? A. Yes. He had formerly taught at Spellman College, I believe, in Georgia and we met him—he was teaching there when we met him.

Q. While you were in Jackson, Mississippi, you discussed the places, the physical places where schools might be held? A. Yes.

Q. What localities were suggested by the local people at that time? A. We weren't meeting with the local people; we were meeting with the COFO staff who were in contact with the local people. They knew the situation in Mississippi.

They suggested Vicksburg as a possible location. Hattiesburg was definitely a location because it was an urban center. There were physical facilities and a desire on the part of the people to have Freedom Schools there.

Meridian was to be a center; Greenville was to be a center where there was to be schools. And also they were thinking of Gulfport and Biloxi. There may have been one or two other places [58] mentioned.

Q. How many schools were they going to have? A. They were planning for us to staff seven of them, originally. Originally they were planning for us to staff seven of them. But this changed between—it changed a number of times between the time we discussed it and the time we got to Mississippi and even during the summer itself it was changed.

Q. It was originally planned for seven? A. Yes.

Q. Would that be for schools for the entire summer; is that correct? A. Yes.

Q. How many children were they anticipating to attend each of the schools? A. It varied. I don't know what the estimates were for each of the schools. There were estimates as to how many students would come, but I don't know what the estimates were for each place.

Q. Approximately how many teachers was it anticipated they would need to staff these schools? A. They were not relying only on us. They were recruiting college students too—college students were going to be summer volunteers also, teaching the Freedom[59] Schools, but they were hoping that we could bring down a sizeable contingent of New York City—that is, of professional teachers. I don't—I think at that time we were engaging between 35 and 40, and that was what we actually got.

Q. That is what you were thinking in terms of? A. Yes.

Q. In addition you understood there were going to be college students? A. Yes, college students participating in the project also.

Q. Had you met with any of these college students? A. That were going to be volunteers, no.

Q. While in Jackson, apart from discussing the physical location of the schools, was there anything else discussed?

A. Yes, we discussed our function as teachers, whether it was to be limited only to teaching, whether we would participate in voter registration activities, how deeply involved in the life of the community it would be. There was a very long discussion on that.

Q. Who was present at this discussion, do you [60] recall?

A. A young man named Charlie Cobb, Ivanhoe Donaldson, and the girl's name I cannot remember.

Q. The same girl? A. Yes, she was there. There were others there, but I don't remember. The conversation was primarily between Ivanhoe, Charlie, Norma and myself.

Q. Norma is Mrs. Becker? A. That's right.

Q. Who is Charlie Cobb? A. Charlie Cobb is a SNCC worker.

Q. Is he from New York, do you know? A. I think he is from the south. I believe he is from Mississippi, but I am not sure.

Q. Is this the first time you met him? A. I believe—no, I met him in March also.

Q. Where? A. At the curriculum conference.

Q. Is he a teacher? A. No, he is only eighteen or nineteen—he is a student.

Q. Where is he a student, do you know? A. I don't know if he still is in school. He was [61] attending Howard University.

Q. Howard is in Washington? A. Yes, in Washington.

Q. You don't know if he still was a student at that time? A. No, he had been a SNCC worker for some time, so I knew he was not in school then.

Q. You don't know where he is right now? A. At the moment, I don't know.

Q. Can you tell us in substance of the conversation between you and Mr. Donaldson, Mrs. Becker, Mr. Cobb? A. Yes, primarily our position was—Norma and I were concerned—well, they were talking about going out and chopping cotton, that we could have to do this.

Q. Did you say chopping cotton? A. Chopping cotton.

Q. I didn't know one chopped cotton. A. That is the

phrase for it. Ivanhoe said they emphasized that whatever the community—whatever the life of the community—whatever the life of the community was, we should, if we wanted to be effective, that we should participate in it, even if it meant going out and chopping cotton, [62] and then teaching Freedom Schools.

Norma and I at that time had a very traditionalistic view of what our function would be, and we thought we would operate a little more as school teachers sometimes operate; that is, you make your lesson plans and you go into your classroom—and they disabused us during the course of the evening.

I began to see what it was that was involved and I began to realize that this was exactly what we would have to do, that if we were called upon to chop cotton, if that is the thing people did in the community, and we wanted to be good Freedom School teachers, that that is what we would do.

Q. Was there any discussion of physical danger as a result of chopping cotton or what have you? A. We had discussed—Norma and I—Mrs. Becker and I felt very responsible for the fact that we were bringing other teachers with us, and that if we were exposing ourselves to danger, that was our personal decision, but we did not want to involve other people in the most dangerous situation. So we asked that teachers be sent to the places where there was the least likelihood of danger.

Q. Did they identify where those places were? [63] A. Yes, the places mentioned were the ones where the Freedom Schools were likely to operate most free from danger.

Q. I gather, though, that they pointed out that there still was some danger? A. That's right, that's right, we were aware of this.

Q. You were aware of this? A. And everybody who volunteered was aware of the danger.

Q. You say during this discussion with Mr. Donaldson and Mr. Cobb you discussed participating, I gather, in the community life? A. Yes.

Q. The Negro community life? A. Yes.

Q. Were there any specific discussions regarding civil rights activity? A. It was established then, and this was COFO policy through most of the summer, that participating in the life of the community meant participating in voter registration activities. However, it was not—we were not to participate in tests of the Civil Rights Bill, that the policy was most emphatically that we would not participate [64] in demonstrations and sit-ins and so forth. So the subsequent action was actually in violation of COFO policy. I as an individual was going against COFO policy.

Q. Let me just ask you along with this, quickly—did you participate while in Mississippi in any voter registration drives—we will come back to specifics later. A. I did go around with my students. They were involved in voter registration activities and I went around with them to their homes. However, the students did the talking.

Q. We will come back to that later. Since you mentioned it, I thought I would ask about it right now. On your way back to New York you stopped back and saw Mr. Staughton Lynd? A. Yes.

Q. How long did you stay there? A. We just met him at the airport; we were there for about an hour.

Q. And what was the substance of the conversation? A. He had some material. It may have been—he may have handed us these papers here—there was some other [65] material too. He may have given us the rough copy for the material that was subsequently run off. He gave us some other curriculum material too, which I no longer have in my possession.

Q. Was there any discussion up to this time of what sort of training you would have before you actually started teaching in Mississippi? A. We knew that there was to be an orientation session held on the orientation—the major orientation was held for the students in June—that is, the college student volunteers. It was held in June, but since we were still teaching we could not attend that session, so they were

going to arrange for special sessions for us when we came down later. Also, Mrs. Becker and I set up an orientation session ourselves for the teachers we had recruited to report to them the findings of this weekend.

Q. This is after you came back? A. That's right.

Q. When did you find out, or who established this idea of the orientation program? A. COFO established this. They felt that everybody who went into Mississippi should have preparation for it.

Q. Were you going to participate in that? [66] A. We knew we would be in the orientation session. We knew that we would not be able to be in the one in Oxford, Ohio.

Q. Were you involved in the decision to formulate such a program or to have this program— A. No, COFO established it.

Q. You were not involved in that? A. No.

Q. What did you understand the purpose of this program was? A. The orientation session?

Q. Yes. A. It was to prepare us for the life in Mississippi, the life of the Negroes in Mississippi, the kind of situation that prevails in Mississippi, and it would be an analysis of white attitudes toward summer volunteers; some background of the power structure of Mississippi and instructions in non-violence, some background on the students we would be teaching.

Q. This trip to Mississippi with the stopoff in Atlanta was when, the beginning of June? A. June 6th, the weekend of June 6th, I think, 1964.

Q. Upon your returning to New York, you and Mrs. Becker conducted an orientation program? [67] A. Yes.

Q. This was attended by whom? A. By the teachers who volunteered to go down to Mississippi.

Q. How many were there? A. At the meeting there were more than twenty; I am not sure exactly how many came.

Q. What was discussed at this program? I gather you and Mrs. Becker conducted it. Can you tell us what was said? A. We gave them our own personal impressions of

what we had seen in Mississippi, and we also confided in them the experience, going down, and that we would be school teachers, and also being told how we had to function as human beings more than as teachers. We told them where the schools would be, gave them whatever data we had at that time about the school situation, and so forth.

The expectations there—how we would be living—all the information we could gather in that weekend we passed on to the people who came to the orientation session.

Q. You say you passed on to them what you had seen in Mississippi. What had you seen? [68] A. Well, we visited Vicksburg and we discussed that. We met some of the people who would be involved in this program. We had met a couple of members of the Freedom Party, and this is—just what it looked like in Jackson, and the other information we could gather and what Staughton Lynd told us, of course.

Q. Was there any discussion of white attitudes in Mississippi? A. I am sure there was, but I don't remember specifically what was said.

Q. Where was the meeting held? A. Where was it held?

Q. Yes. A. In District 65. That is down on 9th Street—Astor Place.

Q. Is that a meeting hall? A. Yes, District 65 is a union, and that is their hall, and they rent rooms. And we rented a room from them about this size.

Q. These teachers who were present at this session, did they attend the Oxford, Ohio orientation? A. No, no, no. The point was that they could not. We went down later. We went down to Memphis.

Q. When did you complete your school teaching [69] for that term, do you recall? A. I guess it was June 19th, because I left the next day, which was the 30th. The 30th was a Saturday, when I left.

Q. The 30th was a Tuesday—and Saturday would have been the 27th. A. Then we finished school on the 26th.

Q. At this point in time did you know precisely where you would be teaching? A. I was pretty sure that I would be in Hattiesburg.

Q. How about the rest? A. Well, the determinations as to which person would go where, I think Mrs. Becker and I sort of sat down and tried to balance out what teachers would be sent where, based on information, based on the skills of the individual teachers, and also to attain a balance of men and women and age groups, and so forth. There were all those things—all that was changed too.

Q. Based on that you were fairly certain you would be going to Hattiesburg? A. Yes.

Q. This is something I gather you and Mrs. Becker had determined? [70] A. Yes.

Q. And where was Mrs. Becker going to be going? A. She was going to be going to Greenville, and that is where she went.

Q. Any particular reason why you chose Hattiesburg? A. I think it was recommended to me. I think one of the workers—I don't know, I think he recommended that I go to Hattiesburg.

Q. Had you ever been there before? A. No.

Q. This orientation program which you attended along with the other teachers, that was in Memphis; is that right? A. Yes.

Q. And you left on Saturday the 27th? A. No—Saturday the 27th—I am a little unclear. I know that I entered Mississippi July 4th, which was a Saturday, and I had spent—I guess, yes, it was the 30th and it took us a day and a half to get to Memphis, and I arrived the 31st. And we were there until Saturday morning, the 4th of July, and then I went to Hattiesburg.

Q. How did you travel? [71] A. By bus. We traveled by bus from New York to Memphis and from Memphis to Hattiesburg by bus.

Q. Did you rent a bus? A. No, no, we traveled in a public conveyance.

Q. Weren't there 35 or 40 of you? A. We didn't all go down at the same time.

Q. Who went with you? A. Ira Landess.

Q. Are these all teachers you are going to name—here in New York? A. Yes. Stan Zibulsky; Mr. and Mrs. Cohen

joined us in Washington. There was another couple, I can't remember their names at the moment.

Q. Were the funds for this trip taken from the funds that you have previously described? A. Yes.

Q. How much money had been collected for this purpose? A. I am not sure of the total amount. It was handled through the union, so I don't know how much was collected.

Q. It was put into a special fund? A. Yes.

[72] Q. You traveled down from Memphis. Where did you stay in Memphis? A. We stayed at—we boarded at a home, a woman's home. She had a boardinghouse in the Negro community in Memphis.

Q. There were orientation programs? A. At Le Moyne College.

Q. Who was in charge of conducting that program? A. I don't remember the names of all the people involved with that. Mr. and Mrs. Eric Weinberger seemed to be in charge.

Q. Where are they from? A. I think they are from New York, but they had been in Meridian for some time.

Q. Did they live there? A. No, they had been workers, CORE workers in Meridian for some time.

Q. Were they teachers? A. No.

Q. Do you know what Mr. Weinberger did for a living? A. No. At the time he was a CORE workers, so I imagine he was on the payroll of CORE.

Q. And the same I guess would be true of his wife? [74] A. Yes.

Q. And it was your impression that they were in charge of this school? A. Yes—well, it wasn't any school in the formal sense—a program.

Q. Anyone else do you recall as having aided in conducting this program? A. Yes, there was someone there from the National Council of Churches; I don't remember his name. There was a minister and I don't remember his name. We also heard recordings from the previous session in Oxford, Ohio, recording of Staughton Lynd, and there was also a recording of a minister who spoke at Oxford, but I don't remember his name.

Q. How was this program conducted? Will you describe generally if it was by lecture or by discussion groups? A. Both. There were lectures and discussions groups. There were work sessions in non-violence. Mr. Weinberger did that. We would act out situations. Also, later Ivanhoe came up with another volunteer, McArthur Cotton, and they conducted sessions in how to react in situations.

Q. Can you describe some of these sessions to us? [75] A. Yes, we would be in a car, for example, we would place a chair so it would simulate a car, and we were stopped by the sheriff. What would we do? Somebody would act the part of the sheriff and we would respond to situations.

Q. What did you do? A. The emphasis was always to react non-violently; that is, to offer no resistance, to defend yourself, if necessary, but to try to reason, if at all possible. That was in essence our advice. We were never to resist arrest, never to provoke incidents. If we were insulted we were to—we were not to respond to abuse.

Q. You were not supposed to resist arrest? A. No.

Q. Were you told what to do if arrested? A. We were told not to leave the jail in the middle of the night. We were told—advised not to travel alone, so in case one of us is arrested, the other could at least report, or if we were both arrested together, that we would offer some sort of comfort to each other. The situation was described—that is, we were told how COFO workers operated when someone is arrested. The person sits outside the jail all night long, if need [76] be, to assure those in the jail inside that he is watching and he will report whatever is happening to the prisoner—and different details like this were explained to us.

Q. You also mentioned that there were other lessons, as it were, in non-violence. Apart from incidents in cars, were there other workshops that you engaged in, in this regard? A. Yes. There was a session I remember—McArthur and Ivanhoe conducted a session where they really acted out a situation in jail, the kind of thing you were likely—that you could expect.

They put themselves in the position of jailer and prisoner and gave a vivid idea of the kind of things you would hear

if you were arrested, and how you responded in a situation, what you do when things like this are said to you, or when things are done to you.

Q. The essence of that was to ignore it? A. As much as was possible, withdraw yourself from the situation, to ignore it, to try—if other prisoners are involved who are instructed to beat you or harass you, you were, if at all possible, to try to reason with them.

Q. Apart from the instructions which you received [77] in non-violence and what to do in case of arrest and that type of thing, did you receive other instructions there as well? A. Yes. I remember this very vividly—the instructions on non-violence. I remember there was a very practical thing. There were discussions, I remember, in recordings. A minister had spoken about the motives of people in going to Mississippi, and that we should examine ourselves very carefully before we went to Mississippi to know just what we were doing there. There was an attempt to have discussions of white feelings about Negroes, and Negro feelings about whites. I mean that we did have discussions about that.

Q. You mean Mississippians' feelings or just your own feelings? A. Our own feelings about Negroes and the Negroes' feelings about us, how they would treat us when we were there.

Q. Did you also discuss, or were you lectured on, the attitudes of people in the various localities to which you were going? A. Yes. We were also told about the feelings of the [78] white people.

Q. In the localities? A. Yes, that's right.

Q. Do you recall what you were told, generally? A. I remember Mrs. Weinberger said that they think of themselves as God-fearing, law-abiding, good citizens, and you are atheists and communists, and you are there to turn over their—to destroy their way of life. This was the essence of what she said. There was an exploration of how they feel—how the white people in Mississippi feel about themselves and how they regard us and what we should expect.

Q. What is it that you were told to expect? A. As I said, they think that they are on the side of the angels and we are dirty communistic atheistic beatniks trying to do all kinds of horrible things to them.

Q. Was there a reference at this program to the policy of COFO which you had stated earlier about not engaging in any demonstrations as such? A. Yes.

Q. This was reiterated again? A. Yes.

Q. It had been said to you while in Mississippi? [79]

A. Yes.

Q. It was now said to the entire group? A. Yes.

Q. Was there any discussion of that? A. Yes, there was.

Q. Will you tell us generally what the discussion was about? A. Along with this—we were instructed that we were not to do this, and there was—not to participate in demonstrations. There was also discussion of—well, mainly, it was this. There wasn't too much discussion about this. This was policy. We discussed our other activities.

Q. What other activities? A. How we would function apart—if we were not going to demonstrate, what we would be doing, and the difference between demonstrating and voter registration.

Q. And teaching? A. Yes, that's right.

Q. You were at this school now about three days; is that right? A. Approximately, yes.

Q. Did everyone in your group go to Mississippi from there? [80] A. The people who left from New York with me?

Q. Yes. A. There were other people in Memphis besides—

Q. I gather there were other people that you met in Memphis? A. Yes.

Q. How long did your group stay in Memphis? A. Different people came in all the time, so the group was in flux. When I first arrived I would say there were about between forty and fifty volunteers. These were college students, teachers from other parts of the country, ministers, university professors, and so forth.

Q. Was the whole New York group with you at that time?

A. No, there were only about eight of us, I believe, from New York. The others came down, and there was to be another session in Memphis after we left. The other people came down later and people came down during the summer also, at other times during the summer.

Q. From there you went to Hattiesburg; is that right?

A. That's right.

[81] Q. Did anyone in the group from Memphis go to Hattiesburg with you? A. Yes, yes.

Q. Who was that? A. Ira Landess went to Hattiesburg, Doug Tuchman, who joined us in Hattiesburg, a girl named Barbara Schwartzbaum, who had come down with us from New York, went to Hattiesburg with us. Stan Zibulsky was in Hattiesburg. There were, I think, a couple of other people who went to Hattiesburg also, and I don't know who else, and who went down with us.

Q. Was this teaching group that you went with—and by that I mean the group that originated here in New York—was that an integrated group of both white teachers and Negro teachers in that group? A. Yes.

Q. There were? A. Yes.

Q. Were any of the people who went down from Memphis with you, were there both Negroes and whites in that group? A. No, that was not an integrated group.

Q. That was not? [82] How about the group that went to Hattiesburg? A. Yes, the group that went to Hattiesburg was integrated.

Q. The group that went from Memphis? A. From Memphis to Hattiesburg was integrated. A young man named Bill Jones is Negro and he was with us.

Q. How many teachers went from Memphis to Hattiesburg? A. There were other volunteers—I mean, there were other people in Memphis besides teachers. They were going to serve as voter registration and community center people. I think most of us who were going to Hattiesburg were going to be teachers.

Q. How many of those were there? A. I think there were about seven or eight of us who went from Memphis to Hattiesburg.

Q. And it was understood part of that time that you would spend the entire summer teaching in school there?

A. Yes, there were several schools there and we knew we would be teaching at one of them.

Q. There were several schools there? A. Yes, Hattiesburg is a large community and a [83] number of ministers offered their churches, their facilities—I think altogether there were six or seven schools in Hattiesburg.

Q. How many would be accommodated at each school, approximately? A. Again, we were not going to be the only teachers who would be there. Some other teachers had already been there. I don't know, I forget what the projected quota was for each school.

Q. Were these broken down by high schools and grade schools, and what have you? A. Well—

MR. KATZ: Mr. Litvak, how in God's name is this relevant to the cause of action as alleged in this complaint? You tell me.

MR. LITVAK: I am trying to find out what the situation was in Hattiesburg, the type of school, whom she was teaching.

MR. KATZ: How is it relevant to an alleged claim of deprivation of civil rights?

MR. LITVAK: I want to know whom she was teaching, what circumstances she was there under—all of this is relevant. This is a deposition.

[84] MR. KATZ: I understand it is a deposition, but I fail to see how any of these questions in this two-hour period, with some exceptions, have any bearing or relevance to the cause of action in the complaint.

MR. LITVAK: I think they are definitely relevant. I am trying to get the background and that is what I am trying to get. Now she is in Hattiesburg and I would like to find out the circumstances under which she was teaching, whom she was teaching, and the events leading up to the date in question.

MR. KATZ: Again, I fail to see the relevance of either the curriculum, the names of the teachers who were present,

or the instructions that she received, with respect to this cause of action.

MR. LITVAK: If you cannot see them, I'm sorry, but I think it is so patently relevant I won't even bother to go into it. The names of the people are relevant because they may be witnesses who may have information about the case. The nature of the curriculum and what she [85] learned in Memphis may be very relevant with regard to her damages. I think it is just so obvious that I am surprised you can't understand. I will move along as quickly as we possibly can; I have every hope of completing it.

It is about 12:30, would this be a good time to recess for lunch?

MISS PIEL: We can stop now. Let us try to resume at 1:15.

(Whereupon, the proceedings were recessed for luncheon at 12:30 p.m.)

* * *

[86] EXAMINATION BY MR. LITVAK: (Continued)

Q. When you arrived in Hattiesburg, were you assigned to a group of children to teach? A. During the week I was assigned to a school.

Q. In Hattiesburg? A. That is right.

Q. What school was that? A. Priest Creek Baptist Church.

Q. That was one of six or seven schools in the area; is that right? A. Yes.

Q. Did you teach just English there or a variety of subjects? A. A variety of subjects.

Q. What age group were you teaching? A. I taught primarily high school students.

Q. Would that be the first year of high school right through the senior year? A. I would say from about 14 through 17.

[87] Q. How many classes did you teach? A. Well, it wasn't a regular school as such. I taught in the morning from 8:30 to 11:30 and again in the evenings from 7:30 to 9:30.

Q. Would it be the same group of children? A. No, it varied. In the evening I taught adults, also.

Q. How many were there in each class? A. There were about 35 every day.

Q. That would include both morning and evening? A. Well, in the evening there were slightly fewer. There were 20 in the evening—about 20 came in the evening. I would say about 50 came in the morning.

Q. Did you start teaching the Monday following your arrival at Hattiesburg? A. Yes.

Q. Was your instruction in these classes limited to academic subjects or was there any instruction in civil rights activity or anything of that nature? A. There was no instruction in civil rights activities.

Q. Were there discussions relating to civil rights problems, civil rights activities? A. Yes.

Q. This was part of the curriculum? A. Yes.

[88] Q. Was this discussed with each group on a daily basis? How was it handled? A. There were several teachers and sometimes—we generally worked with the same students but sometimes we changed classes. It was an informal set-up. We taught fairly informally. We were sometimes planning ahead of time among the different teachers, and we would bring up the different problems, work on it together and discuss it together.

Q. What problems were brought up? A. We discussed, for example—for instance, Negro history. We planned a unit, so to speak, on the origin of the movement.

Q. Which movement? A. Which movement?

Q. Yes. A. When we speak of the movement, it is what we mean by the whole civil rights movement, say, since 1954.

Q. Was this one of the subjects, so to speak? Were you teaching in addition to this mathematics, English and subjects like that? A. Yes, we did, but they were not taught in the abstract. Mathematics would be taught with reference to the economy, the consumer problems of people in Hattiesburg. [89] English—composition and so forth, related to problems of their life in Hattiesburg. The books we read, books by James Baldwin, Richard Wright, related to problems of Negroes in America.

Q. Did you discuss with your students at any time prior to August 14th, let us say, segregation in Hattiesburg, segregation in Mississippi? A. Yes, we did.

Q. On numerous occasions? A. I would say so, yes.

Q. Can you tell me what the substance of these conversations usually was?

MRS. PIEL: I will object to a question what the substance of the conversation usually was.

MR. LITVAK: If you want me to go at each one specifically, okay.

Q. Can you tell me when you recall the first of such conversations took place? A. Very early. I am sure that segregation is a large part of life in Hattiesburg and we were discussing it very early in the Freedom School.

Q. Almost from the time you arrived? A. Yes.

[90] Q. Can you tell me the substance of that first conversation? A. You mean the first conversation at the school?

Q. Yes. A. I don't remember, no.

Q. Did you have conversations in the community there outside the confines of the classroom? A. Yes.

Q. Also relating to segregation and civil rights problems? A. Yes.

Q. Can you recall the substance of the first of such conversations you had? A. The first conversation we had was the first day we arrived, on the 4th of July, and it wasn't being celebrated anywhere else in Mississippi, but they were having a 4th of July picnic. But we had to leave before dark because it got dangerous. We were instructed on the kind of things we might encounter if we stayed beyond sundown.

Q. With whom did you have this discussion? A. All the people at the picnic.

Q. With these students? A. Students, their parents, ministers, members of the [91] community in Hattiesburg.

Q. Can you tell me the substance of the conversation, that you recall? A. I just remember someone saying, "Come on, we better get out of here, because it is getting dark and we are in danger after dark"—and comments along that line.

Q. Do you recall any discussion or conversation relating to segregation of specific facilities in Hattiesburg, specific stores or groups of stores? A. No, we didn't go into that yet.

Q. Did you discuss at that time the civil rights bill which had been recently passed? A. No, we did not.

Q. There was no discussion at that time? A. No.

Q. With regard to the next conversation which you recall relating to this general subject, can you tell us approximately when that was? A. I am sure that it probably—that there probably wasn't a day all the time I was there that we didn't discuss some aspect of segregation and the problems attendant on segregation, because it so completely dominates life in Mississippi that it is impossible to talk or even think about anything else.

[92] Q. Did you discuss the Civil Rights Bill? A. Yes. I don't remember the first time I discussed the bill.

Q. Did you discuss specific stores or facilities in Hattiesburg? A. The students did. They would inform us about conditions there.

Q. In Hattiesburg? A. Yes.

Q. Do you recall when this happened, when they started informing you? A. I don't remember the first time. It happened early onwards; we were discussing this, in an effort to know what the life of Hattiesburg was like.

Q. Do you recall what they told you? A. I know that the picture was one of total segregation. There was very little that they could do.

Q. Did they name specific stores or specific facilities? A. It came out later on that they couldn't go there or they couldn't go there or something—they would like to go here but they couldn't go here or there.

Q. Do you recall where it was that they couldn't go, that they told you about? [92] A. They told us about the drive-in theater. They wanted to go to the drive-in theater. Even though the bill gave them the right to go, they were afraid to go.

Q. Which was it, they couldn't go or they were afraid

to go? A. They always had the right to go, but they couldn't go because they were afraid to go.

Q. Is there any place else that they told you they couldn't go? A. The Holiday Inn, all the movie theaters in town, with the exception of one theater that let them in, in the roped off section. There were a number of restaurants in town they mentioned. The white schools, the library—they talked about going to the white schools.

Q. You say restaurants. Do you recall any specific restaurants being mentioned? A. No, I don't.

Q. Do you recall their mentioning any restaurants or eating facilities where they could eat? A. Yes. They said they could go to the—since the bill had been passed, they could go to the Woolworth and Kress lunch counters, but before the bill had been passed, they were not able to go there.

[94] Q. The bill had been passed and they could? A. Yes.

Q. Had any of them been there, do you recall? A. I think a couple of them had been.

Q. Where? A. To the Woolworth Store, yes.

Q. Had any been to the Kress Store? A. I think one or two of them had.

Q. Did they tell you they had eaten there without incident? A. They told me they had eaten there with unpleasantness.

Q. Unpleasantness? A. Yes.

Q. Specifically who, do you recall? A. Which particular student said it? I don't recall which specific student said it. I know all the students had unpleasant experiences.

Q. Do you recall which students had been to the Kress Store? A. No, I don't.

Q. Do you recall what unpleasant incidents happened to those students? A. The waitresses were deliberately slow, people came [95] by and insulted them while they were eating.

Q. People? A. Customers in the store came by and insulted them while they were eating and the waitresses made them wait.

Q. Made them wait? A. Yes.

Q. They were all served? A. Yes.

Q. Those that told you about it, anyway? A. Yes.

Q. Up to this time—and by this time, I mean about July 4th or 5th—had you been in the Kress Store? A. No.

Q. Had you been in any Kress Store anywhere? A. Of course, in New York City.

Q. Any place other than New York? A. I may have. I may have gone to a Kress Store, but I don't remember.

Q. Were you in a Kress Store in Richmond? A. No, I had never been there.

Q. It is fair to assume that you never encountered any incidents in any Kress Store prior to July 4th? A. No, that is right.

Q. You stated that the children mentioned to you [96] at various times the facilities which were either denied to them or they were afraid to go to. Can you tell me what you said or what the teacher said in response to this? What was the conversation? A. We did not think too much about—they were explaining to us what it is like down there, and it was really an education for us, and a sort of a catharsis for them—it worked that way.

Q. So there was no real discussion about it in the sense of your supplying any answers or attempting to supply any answers? A. No, we couldn't supply any answers.

Q. Did you discuss with them at this time—and by at this time I am including the month of July—any attempts to integrate any facilities in Hattiesburg or elsewhere? A. By that you mean did we encourage them to do this?

Q. Did you discuss it with them? A. We probably asked them where they had gone, what they had tried to get in to, what they had tried to do. We asked them about public facilities, whether they were allowed to go into public facilities. We asked them that.

Q. When you say "we," were you ever present [97] when any other teacher engaged in this conversation? A. I am sure I was but I don't recall the details.

Q. Do you recall what teacher it was who took part in

these conversations? A. I imagine each teacher down there took part in these conversations.

Q. Did you or any of these teachers, to your knowledge, suggest that they attempt to integrate any of these facilities, up to the end of July? A. No, we did not.

Q. Up to the end of July, again, did any of the students or anyone else ask you to participate in any attempted integration of any facilities? A. We were in a Woolworth's one day when someone asked us—a couple of workers and students were together. I was with a volunteer and a couple of students asked us to sit down at the lunch counter with them; because there was a lot of attention focused on us by the store, we decided not to.

Q. Did any of the students or anyone else tell you of any incidents of violence that occurred in Hattiesburg relating to any attempt at integration? A. Well—

MRS. PIEL: I will object to that question. [98] I think it calls for hearsay.

MR. LITVAK: Yes, but it is a deposition where hearsay is certainly admissible.

MRS. PIEL: I am sorry, I know we have had a lot, but I am sure that it is not, and I will object to it and instruct the witness not to answer.

MR. LITVAK: It very definitely is. Most of what I will ask is definitely hearsay. I tell you quite frankly, but I assure you you are mistaken. Hearsay is certainly proper on a deposition. I don't want to bother a Judge, and I will keep it balanced—but I assure you it is admissible. There is no question about it, but it is admissible on a deposition. You reserve your right to object on the trial, of course, but on discovery it is proper. I would, therefore, ask you to please reconsider.

MRS. PIEL: Off the record, please.
(Discussion off the record.)

MRS. PIEL: She may answer about whether she had heard of any violence in Hattiesburg.

Q. Will you answer the question? [99] A. Yes, I did hear of violence.

Q. This is during the month of July, we are talking about?

A. Yes.

Q. Will you give me the date or the approximate date of your visit to the Woolworth Store* that you just told me about, when you were asked to sit down with some students?

A. Around the middle of July, probably.

Q. Until this time, and again I mean through the end of July, had you met or had any encounter with the chief of police or any other police officer in the Town of Hattiesburg? A. Yes. I had numerous encounters with a man named Constable Kitchen.

Q. Who is Constable Kitchen? A. A member of the constabulary in Hattiesburg, Mississippi.

Q. When and where did you have encounters with him?

A. He was around all the time.

Q. Out at Palmer's Crossing? A. Yes.

Q. You had occasion to talk with this police [100] officer, the constable? A. Most of the time he did the talking.

Q. Did you have occasion to discuss with him, or he with you, integration of facilities in Hattiesburg, or the attitude of the town's people? A. He seemed to be—

MRS. PIEL: Just answer the question. Did you have an opportunity to discuss with him? A. I didn't discuss with him anything.

Q. Did he tell you anything of that nature? A. He mentioned it, yes.

Q. Will you tell me what he said to you? A. Most of what he said to me I can't repeat—I don't feel like repeating.

Q. Was it obscenities? A. Yes.

Q. I don't want you to repeat that, but can you tell me the substance without getting into the specific language that he used, the substance of the conversation or the substance of his remarks to you? A. That we were out to stir up trouble. I think he was very interested in our social activities, after hours.

Q. Other than this gentleman, had you had occasion to meet any other police officers? [101] A. Not close up,

no, but I saw them quite frequently.

Q. When you were in town, you mean? A. Yes.

Q. Did they come out to Palmer's Crossing? A. No.

Q. Up through the end of July had you been in the Kress Store in Hattiesburg, Mississippi? A. Yes.

Q. Do you recall how often? A. I went there a couple of times to buy supplies.

Q. Teaching supplies, you mean? A. Yes.

Q. Had you ever gone in accompanied by any of your students? A. No.

Q. Did you go in with anyone else? A. Yes.

Q. Who? A. Douglas Tuchman.

Q. On more than one occasion? A. There may have been one or two occasions, yes.

Q. Did you eat at the Kress Store on any of those occasions? A. Once, I think, we ate at the Kress Store.

[102] Q. At the lunch counter? A. Yes.

Q. Were there any Negroes at the lunch counter? A. No.

Q. On those occasions there were not? A. No.

Q. Did you have any discussion with anyone in the store on those occasions? A. No.

Q. Did you ever meet with the store manager? A. No.

Q. Other than the incident that you related at the Woolworth Store, in the middle of July, was there any other occasion up through the end of July where any of your students or anyone else down at Palmer's Crossing asked you or any of the other teachers, to your knowledge, to participate in any integration attempt? A. In the Town of Hattiesburg?

Q. Yes. A. No.

Q. In any other town? A. No. Integration attempt—we were an integrated community where we lived.

Q. I understand that. Apart from where you were actually located? [103] A. Yes.

Q. I believe you said that you taught a class in the morning; is that correct? A. Yes.

Q. And then you taught another class for adults in the evening; is that correct? A. Yes.

Q. Did you teach during the afternoons, as well? A. Toward the end of the summer I set up a typing class a couple afternoons a week.

Q. Other than that your afternoons were free, I gather?

A. No, they were not free. I was preparing lessons or was in meetings with my students.

Q. Were any of your other capacities related in any way to the other civil rights activities? A. I told you before I went to their homes; I went to the homes of the people in the community with the students; that was the only other activity.

Q. Voter registration? A. When they were doing voter registration, yes.

Q. And the homes you went to were those in Palmer's Crossing; is that right? A. That is right.

[104] Q. Did you encounter any incidents or trouble from any of the town's people of Hattiesburg in connection with that voter registration drive? A. No, because I wasn't in Hattiesburg when that was happening.

Q. And you had no occasion to deal with these people at all? A. That is right.

Q. Were all your students involved in this voter registration? A. No.

Q. Just some? A. Yes.

Q. Starting in the month of August, what was the first time you recall discussing with any of your students any plans or attempts to integrate any facilities? A. They said that they had wanted to go to the drive-in. They said that a number of times.

Q. Will you tell me who? A. Pardon?

Q. Can you tell me who said this? A. I can't remember specifically which ones said it. Quite a number of them wanted to go to the drive-in.

[105]. Q. They had cars, I presume? A. No, that was part of the problem. They did not have cars.

Q. Was the drive-in in Hattiesburg? A. No, it was outside of Hattiesburg.

Q. As I recollect, you had a car down there? A. No.

Well, we rented a car; I didn't drive it, I don't drive. There was a car—we rented a car. There were a number of cars available. I didn't have one of them.

Q. You said that they had expressed on a number of occasions a desire to go to the drive-in theater; is that correct?

A. Yes.

Q. Focusing on the beginning of August, do you recall a particular conversation relating to the drive-in theater? A. I can't tell you what dates the conversation took place about the drive-in; no.

Q. Will you tell me the substance of the conversation?

A. They wanted to go—they were planning to go. I asked them about it later, had they gone, and they said no, they were not able to get the cars and [106] money was a problem, and they were also afraid.

Q. Had they requested you to go with them? A. No.

Q. At any rate, I gather that up to this time they never in fact went to the drive-in? A. No, they did not.

Q. Did they discuss with you during the first week of August, let us say, integrating any other facility in Hattiesburg? A. Very often they expressed a desire to go to places, yes.

Q. Didn't they just say we would like to go to this place or that place? A. Yes, they wishfully—a statement like I want to go to a white school in the fall—or something like that.

Q. Were there any discussions of integrating any eating facilities in Hattiesburg? A. No. There may have been, I don't recall.

Q. When is the first time you recollect any conversation relating to the library in Hattiesburg? A. Well, I am sure that early in the summer when we had these discussions that I mentioned about trying to find out what the issue was like—I asked about public [107] facilities, including the library, "Do you have a library," and I imagine it was referred to again. I know the students had conversations apart from school about going to the library. It was probably around the middle of August that they probably discussed in class the idea of going to the library.

Q. Do you recall anything about the discussion? A. They just said that they wanted to go. They decided that since it was public, they wanted to go.

Q. Did you say anything, that you recall? A. I probably made the observation that they should be allowed to go. Their parents paid taxes for them.

Q. Did they tell you that they were going? A. Yes, at one point they did. I forget where it was but they had discussed it outside of school and came in and said we want to go to the library.

Q. Was this your entire class? A. This was a group of students—a particular group of students. I didn't teach all of those students at the same time. One group of students wanted to go.

Q. There was one group that you did teach at one particular time as a unit; is that right? A. As I said, the classes changed very often. Sometimes [108] I taught one group of kids and sometimes another—they switched around alot. But I had taught at one time or another all the kids, yes.

Q. But at or about the time in question, August 14th, were they a class, a unit, a group that you taught? A. They were part of a group. You have to consider the whole school as a group. They were a small unit within the group.

Q. I am having difficulty understanding that. Wouldn't you teach a particular group of students at a particular time of day? A. No. As I say, it changed. Sometimes I would—I had, say, a group fairly regularly, but sometimes they would be with another teacher, or sometimes we had a lesson together. We had a team of teachers teaching. It was not a very structured kind of school situation.

Q. Do you recall when it was that the children first told you they were going to the public library? A. It was sometime in the middle of August.

Q. Your recollection is that you told them they were entitled to use it since it was a tax supported institution? A. I am sure I told them something like that; I don't [109] remember exactly.

Q. Was there any discussion at that time as to whether you would go with them? A. When I knew that they were

really going to go, I decided that I should go with them, yes.

Q. Do you recall how long before the day you actually went that this conversation took place? A. A few days before. We went on a Friday. We probably talked about it sometime during that week.

Q. When was it that they asked you to join them? A. Sometime during that week.

Q. Was it a day or so before? A. Probably a couple of days before.

Q. Did you have any discussions with anyone else at Palmer's Crossing concerning going? A. No.

Q. Did you tell anyone you were going? A. No; outside the students, no.

Q. To your knowledge, did anyone know that the students were going? A. I think their parents did; I am certain their parents did.

Q. Did you discuss it with their parents? A. No.

[110] Q. You discussed it with no one in COFO? A. No.

Q. Do you recall the date on which you went to integrate the library facilities? A. It was Friday. It was Friday, August 14th.

Q. Did you pick Friday for any particular reason that you recall? A. The students picked Friday.

Q. Do you recall why? A. It was the end of the week.

Q. Apart from that was there any other reason? A. No other reason that I know of.

Q. Did you tell the students that going with them was a violation of the instructions that you had been given as a teacher in COFO? A. No, I don't think I did.

Q. As far as you know, they were not aware of these instructions? A. They knew it was the policy against—they knew COFO's policy against testing the bill—they knew the policy against testing.

Q. Coming now to August 14th, do you recall what time of day it was when you left Palmer's Crossing? A. It must have been about 12:00 or a little before [110-A] 12:00.

Q. Do you recall how you did leave? A. By bus; we took a bus into town.

[111] Q. Was it a public bus or something? A. Yes.

Q. It runs from Palmer's Crossing into Hattiesburg? A. Yes.

Q. How many were there in the group? A. There were six students—seven—six students and myself.

Q. Am I correct that there were five girls and one boy? A. Yes.

Q. Was there any discussion either the night before or that morning concerning what you might anticipate in Hattiesburg? A. No. They wanted to get library cards.

Q. Had there been any discussion in the preceding days as to what you might anticipate in this effort to integrate the library? A. No.

Q. Had any of them, to your knowledge, ever attempted to get library cards before? A. I am not sure, I really don't know. I know that they—I don't know if they tried to get cards before or not. I had the impression one of them did, [112] but I am not sure.

Q. Up to the time you arrived in Hattiesburg, there was no discussion among you concerning what the attitudes might be, or what might happen. Is that correct? A. There may have been, I don't remember any.

Q. You don't recall? A. I don't recall.

Q. Did the bus take you right in, in front of the library? A. No, it took us a couple of blocks from the library.

Q. Do you recall what street the library was on? A. I think it was on Main Street.

Q. Did the bus come down Main Street? A. Yes, and it stops a couple of—two blocks away from the library.

Q. You got off the bus and walked down? A. And walked down.

Q. Did you notice any crowd at that time? A. I don't—no crowd, I don't remember a crowd. There were people there, certainly.

Q. Do you recall hearing any comments? [113]. A. What is that? Q. Do you recall hearing any comments? A. No.

Q. When you arrived at the library and entered the library, was there a librarian there? A. A girl was at a desk.

Q. Will you tell us what happened then? A. There was a young woman on the telephone as the students approached the desk. She concluded very quickly her telephone conversation and asked them what they wanted. The students said, we would like to get library cards, and she said, "We are not giving any cards right now." Before she spoke to us she had called for her supervisor to come.

At that point the supervisor—or some point right close, a supervisor, a woman in charge came and asked the students what they wanted, and they repeated their request for library cards, and she said, "Did you try the Sixth Street Branch?" and they said they had, yes, but that branch did not have the books that they wanted.

She said something then about I am a [114] Yankee and I am sympathetic, and I am not sympathetic, and I don't remember all the conversation with the students for the next fifteen minutes. She maintained most of the conversation, talking about her efforts to get the trustees to integrate the library and the council had refused—they would close the library if the library was integrated; that some other students had been there previously who wanted books, but when she pointed out to them that if they integrated the library the library would close; that these students would agree that it would be better to have segregated library facilities rather than no library facilities.

When the students questioned it and said they still didn't see why they couldn't have books, she said things like "Close your mouths and open our minds"—I don't remember everything she said to the students. The students reiterated their request for library cards; that it was a public facility, they felt they should have library cards. She said finally, "I can't make you go, but if you insist on staying, I will have to close the library and call the police." [115] One of the students said, "If we can't use the library, we think nobody else should use the library. We are staying." I didn't say anything to the librarian.

Q. During all this time you didn't say anything to the librarian? A. No. I said something to the students, when she

said she would call the police. I said to the students, "What do you want to do?" That was the whole conversation.

Q. Then what did they do? A. They decided to stay, and we sat down and the librarian made a number of phone calls and we were there for about—between twenty minutes and a half hour before the police chief came.

Q. He was in uniform? A. Yes.

Q. Did anyone accompany him? A. He came into the library alone.

Q. Did he say anything to you or the students? A. Yes. He came over to me and he said, "Are you the leader?" and I said, "No, I am their friend." He said, "You have to get out of here; [116] we are closing this library," and we left, and the other people were instructed to leave too, and the library was closed.

Q. That was the entire conversation had with the police chief? A. That is right.

Q. You had never met the police chief before, had you? A. I think I had seen him, but I had never met him, no. I had never spoken to him.

Q. You went outside? A. Yes.

Q. Did he go outside with you? A. Yes, he did.

Q. The police chief? A. Yes.

Q. Was there anyone else in the library when you entered? A. Yes, there were other people there.

Q. Did they leave? A. They had to leave too.

Q. Did the librarian leave? A. No. The librarian and staff stayed there.

Q. When you came outside, did you see a [117] police car? A. Yes.

Q. Was there anyone in the police car? A. It is my memory that there was.

Q. One person or more? A. I think there was one person.

Q. Were there any people out on the sidewalk? A. There were—there wasn't any crowd gathered, no.

Q. Just people walking up and down the street? A. Yes.

Q. Did the police chief say anything to you when you got

outside? A. I didn't hear—he said something—repeated to me like, all right, go about your little affairs now.

Q. Did he leave? A. He went to his car and we walked down the street; I wasn't watching him.

Q. He went to his car— A. He went to his car, yes.

Q. And you and the students proceeded to walk down the street? A. That is right.

[118] Q. Where did you go from there? A. We went to Woolworth's.

Q. How long a walk is it, do you recall? A. About five or seven-minute walk.

Q. Is Woolworth's on Main Street? A. No, it is off Main Street. I forget the name of the street it is on.

Q. Who suggested going to Woolworth's? A. I don't know. One of the students did. He said, "I am hungry," and he said he wanted something to eat, and we said all right, let's go to Woolworth's.

Q. Woolworth's was one of the facilities you were told had served Negroes? A. That is right, yes.

Q. And you and the students all proceeded to Woolworth's; is that correct? A. Yes.

Q. Did you sit down in Woolworth's? A. No, it was too crowded. All the seats were taken, so we didn't sit down.

Q. That was about what time? A. Around twelve-thirty, quarter of one, about there.

Q. Does Woolworth's have both a lunch [119] counter and booths? A. No, just lunch counter—wait a minute, it does have booths. Everything was filled.

Q. Did you walk in and walk right back out? A. No, we stayed a few minutes but no seats emptied up—opened up.

Q. You stayed waiting to see if some seats or booths would open up? A. We walked around the store for a few minutes and there were no seats free, so we left.

Q. Where did you go from there? A. They we went to Kress.

Q. Who suggested you go to Kress? A. Someone in the group did, I guess.

Q. You don't recall? A. I don't remember—I may have suggested or they may have suggested.

Q. As you left the Woolworth Store, did you notice a police car? A. Yes, there were police, quite a number of them all around.

Q. All around the Woolworth Store? A. Yes. There weren't a lot of cars, but there [120] were a lot of policemen around.

Q. When did you first notice them? A. I had been aware of police around us from the moment we left the library.

Q. All the way down the street into Woolworth's? A. I am not saying the car followed us, but we were aware of the presence of police.

Q. You saw policemen about? A. Yes, yes.

Q. Did you see any in the Woolworth Store? A. I think there was one right outside.

Q. Did you see the particular police car, the chief of police's car again? A. No.

Q. Or any police car? A. I saw police cars, yes.

Q. In front of Woolworth's or about Woolworth's? A. Nearby, yes. I remember they were nearby.

Q. Approximately how many police would you say you saw about in the Woolworth's vicinity? A. When I was in the store I have a recollection of seeing one outside the store.

Q. And in front of the store, when you were [121] going or leaving? A. When we left or were coming in, I was aware of other things; I don't remember exactly.

Q. Would you say about four or five? A. Yes, not all staying together.

Q. Did you know any of them by name? A. No.

Q. Although I gather you had seen some of them at various times; is that right? A. Yes.

Q. You say you left from Woolworth's and went to Kress at the suggestion of one of the students, you don't recall whom? A. It may have been at the students', it may have been at mine—I don't remember.

Q. Again we have to assume you were going to Kress

because there again, you understood they served Negroes at the lunch counter? A. Yes.

Q. About how far a walk is it from Woolworth's to Kress?

A. It is only a few minutes, two or three minutes.

Q. When you arrived in front of the Kress Store, did you notice any police about? [122] A. Yes, there is a sort of alleyway running right next to the store. It is really a street—it looks like an alleyway. We saw this car inside the alleyway across the street from Kress.

Q. On the other side of the street? A. On the other side of the street facing.

Q. Facing the Kress Store? A. Yes.

Q. A police car? A. Yes.

Q. Could you see whether there was anyone in the car?

A. Yes. There were two men in the car.

Q. Do you know was it the same car you had seen at the library? A. I don't know whether it was or not.

Q. Did you see any other policemen about? A. Yes, I saw there were other policemen about.

Q. Did you notice any crowd on the sidewalk at this point? A. no.

Q. You were not aware of any crowd following you from the Woolworth Store? A. No.

[123] Q. When you entered the Kress Store, were there seats available? A. Yes. We sat down at two booths.

Q. Do you recall how many booths there were? A. I don't recall exactly how many booths there were in the store altogether. We sat at two of them, four at one and three at another.

Q. Do you recall how many booths there were? A. No. I think there were three or four; I don't know exactly.

Q. Does Kress have a lunch counter? A. Yes, it does. It has tables in the front and booths beyond the lunch counter.

Q. Do you recall, were the tables full? A. The tables—I don't know if they were full or not.

Q. How about the lunch counter? Do you recall if that was full? A. It wasn't full, but we chose the booths be-

cause there was more room there. I did not see seven unoccupied seats at the lunch counter.

Q. Do you recall whether the other booths in the store were taken? A. I think there were some others available, some [124] others empty.

Q. Can you estimate the number of people in the store at that time? A. All together?

Q. Approximately. A. It may have been 100 or more.

Q. Who sat at the booth at which you sat? A. I sat, Carolyn Moncure, Jimmella Stokes, Lavon Reed—I believe. I believe this is the way it was. In the next booth sat Curtis Ducksworth, Gwen Meritt—Gwen Meritt and Diane Moncure.

Q. Did a waitress come over to take your order? A. After ten minutes or so, yes.

Q. You had stayed there about ten minutes? A. Yes.

Q. Which booth did she go to first, do you recall? A. I don't recall if she took the order of the booth where I was first or the order of the next booth; I don't recall that.

Q. Had you or anyone in your group done any shopping at the store prior to that, or did you just [125] go into the store and sit down? A. No, we just went to the booth.

Q. You just went to eat? A. Yes.

Q. You say you had waited about ten minutes? A. Yes.

Q. Had you or anyone else in the group called the waitress up to that time? A. No.

Q. No one asked the waitress to come over? A. No.

Q. The waitress did come over? A. Yes.

Q. And did she give you a menu? A. Yes.

Q. Did she give everyone in your group a menu? A. No. She may have put them down and handed them to us. Everyone had—may have had a menu—or we all looked on, whoever had a menu. I may have looked on with her.

Q. You don't recall? A. I don't remember which girl sat next to me, no.

Q. Do you remember whether you all had an [126] individual menu, or you don't remember? A. I don't remember that, no.

Q. Up to this time when she left you the menu, had you seen anyone in the store that you knew, or did you talk to anyone in the store? A. I didn't see anyone I recognized, no.

Q. Had you seen or talked with the store manager? A. I had never spoken to him.

Q. You had seen him on occasions other than this day, you mean? A. Yes.

Q. You knew— A. I had seen someone there that I identified as the store manager just from the way he was functioning. I don't know if I saw him that day or not.

Q. You can't recall seeing him on this particular day? A. No.

Q. How long would you estimate it was from the time the waitress gave you the menu until the time she came over to take your order? A. About five minutes or so. [127] Q. Up to this time, Miss Adickes, did you see any police in the store? A. My back was to the door, but one of my students saw a policeman come in.

Q. Which student was that? A. I believe Carolyn mentioned it later.

Q. Mentioned it when? A. Later.

Q. Not at the time? A. No.

Q. Do you know whether it was prior to the time that you received your menu or subsequent to the time you received your menu that she saw the policeman? A. I don't remember, no.

Q. Did you ever see the policeman in the store? A. No, I didn't see the policeman.

Q. This girl told you later that there had been one? A. Yes.

Q. Did the waitress eventually come over to take the order? A. Yes.

Q. Will you tell us what happened then? [127] A. The students all gave their orders. She took the orders at both booths, and I was waiting for her to finish with them so I could give mine. She walked away without taking mine, so I called her back. I said I would like to give my order, and

she said, "I am not serving you." I said, "Why-not?" She said, "We have to serve Negroes, but we are not serving whites who come in with them." I am sure I asked her then, "Do you realize this is a violation of the Civil Rights Bill?" and she said, "Yes, we know that, but my manager told me not to serve you." I asked her her manager's name, and she told me his name was Mr. Powell. There may have been one or two more comments made, I don't recall. I do remember these comments.

Then the students said, "Well, if Sandy can't be served, we don't want to be served either," and we left at that point.

Q. Is that the substance of the entire conversation as you remember it? [129] A. Yes, I think there was a couple of other comments, but these are the ones I remember clearly.

Q. You don't remember the other comments? A. I think I repeated, "You realize this is a violation of the Civil Rights Law."

Q. I just want to make sure I understand. She did not ask you to leave, did she, at that point? A. No.

[130] Q. And then the Negro children said that if they weren't going to serve you, they weren't going to stay there either; is that correct? A. Yes.

Q. And you all walked out? A. Yes.

Q. Did you see or talk to anyone on the way out? A. No.

Q. Was there a crowd about in the store at this time, about the lunch counter? A. I am sure that people were watching. I don't think a crowd as such gathered.

Q. But people were watching at any rate? A. Yes, and people, I am sure, had been watching us all the way down in the store.

Q. And people were watching you in the store? A. Yes.

Q. And as you walked out, did you notice any people on the sidewalk? A. Yes, people in the sidewalk were watching us too.

Q. Looking in the store window? A. Yes.

Q. Did you see Mr. Powell as you walked out? A. No.

[131] Q. No one said anything to you as you walked out? A. No.

Q. Were there any policemen in front of the store as you walked out? A. The police car that had been in the alley opposite came right across the street and pulled in front of me.

Q. As you walked out the door? A. Yes.

Q. The police car that you noticed as you walked in, pulled across the street heading toward Kress on the alleyway or street? A. Yes, perpendicular to the street Kress was on, pulled right in front of me.

Q. Had you turned? Is that it? A. No. We walked out of the store. We were going back in the direction we had come, and the alley intersects our path and the police car came right across and intersected us as we were walking on the street.

Q. What happened then? A. The policeman got out of the car and said to me, "You are under arrest." I said, "What are the charges?" He said, "Vagrancy". I said, "Would you mind telling me why I am [132] being charged with vagrancy?" He said, "We have orders to pick you up."

And he took my arm and then said, "Don't resist," and I got in the back and there was a policeman sitting in the back.

Q. Was this the driver of the car who had gotten out?

A. Yes.

Q. It was? A. Yes.

Q. And he said he had orders to arrest you? A. Yes.

Q. Did he say who those orders were from? A. No.

Q. Did you ask him? A. No.

Q. He put you in the back of the car; is that right? A. Yes.

Q. Along with another officer? A. Yes.

Q. Where were your students at this time? A. They were still on the sidewalk.

Q. Did any of them say anything, do you recall? [133]

A. They said, "We will call the office."

Q. Did the driver get back in the car at this point? A. Yes.

Q. Did you drive away? A. Yes, the car pulled away.

Q. Was there any conversation before you drove away?

A. The policeman in the back seat asked me a number of questions—or asked me the same question over and over again.

Q. What question was that? A. Are you a “nigger”?

Q. Did you answer the question? A. No, I did not.

Q. Did he ask you anything else? A. He rephrased the question again, “You with the Liberace glasses, are you a ‘nigger’?”

Q. Other than rephrasing the question, did he ask you any other question? A. I think there was something else he said, but I don’t remember exactly what it was.

Q. Did the driver of the car say anything? A. No.

[134] Q. Had you ever seen this officer or either of these officers before? A. No.

Q. Did they at that time identify themselves to you? A. They were unmistakably police.

Q. I don’t mean that—I mean as to their names. A. No.

Q. Up to this time had any of them used any force upon you? A. No, other than to take my arm.

Q. When you went in the car? A. Yes.

Q. Did either of the officers say anything to you about Kress? A. No.

Q. Did they mention anything about Kress or anyone from Kress? A. No.

Q. Did they mention the library? A. No.

Q. Did they mention the police chief? A. No.

Q. Where were you taken? [135] A. I was taken to the police station.

Q. Directly? A. Yes.

Q. How long a ride was that? A. It was about a five-minute ride.

Q. Any conversation in the car other than what you have already told us? A. No.

Q. Did you see the children leave, the students leave as you left? A. We pulled away and they were still standing there; I didn’t see where they went.

Q. You were taken to the police station? A. That's right.

Q. What happened at the police station? A. At the desk I took out the contents of my bag, which they—they said—I asked why I was being booked on a vagrancy and someone again said, "We have orders to pick you up." I said, "Whose orders"—and they did not respond to that, they did not answer that. They checked the contents of my bag and I said, "Why am I being charged with vagrancy?" I pointed out that I had \$95 in one form of [136] currency or another. They asked me where I was staying and I gave them my address, and told them—I gave them the COFO address. They said, "Do you stay there? Do you sleep there?" I said, "No, I don't, but that is my address." They said, "Well, you don't stay there, you don't sleep there?" So they put me in a cell. I was there for about fifteen minutes and then a policeman came in and brought me back to an office and a man took down information about my address and occupation, and so forth. I was fingerprinted and photographed and returned to the cell.

I asked at that point if I could make a phone call. I think at that point he asked the chief and he said, Well, he just got a call from the COFO office that someone would be down in a short while. I was returned to the cell and I waited there, I would say, about an hour, an hour and a half before the lawyers came down.

Q. You said when you arrived at the police station that you asked again why you were being arrested and some officer said he had instructions. [137] Was this the arresting officer who said this? A. I think a couple of them said that at different points.

Q. There were some more officers there in the station house? A. Yes, "We have orders to pick you up."

Q. Did you see the arresting officer or the officer driving the car, or either of them again? A. I saw them there when they brought me in. I didn't see them after that.

Q. After that you did not? A. No.

Q. Who came down to post the bail? A. Three lawyers. I don't remember their names.

Q. You didn't know them? A. I had seen them before. I knew that they were in for a week as part of the volunteer lawyer's group, but I did not—I had not met them previously.

Q. Did they post the bond for \$100? A. I had left bond—I guess they were putting it up until my bond came down. I had left bond here in New York.

Q. Will you explain that? A. Before I went down I left bond. This was in case [138] I was arrested. Every volunteer did that and they raised it, and when I came down I repaid the people who had put it up.

Q. With whom did you leave it in New York? A. I left it with a friend.

Q. A friend? A. Yes.

Q. Was it \$100 bond? A. I had left \$500.

Q. So they advanced the \$100? A. Yes.

Q. You contacted this friend of yours? A. Yes.

Q. Is that right? A. Yes.

Q. And the friend mailed you \$100? A. Yes.

Q. And you repaid that? A. Yes.

Q. Did you go from the police house to the COFO headquarters? A. When I got released, yes.

Q. Did you have any conversation with anyone there?

A. When I got back to COFO?

[139] Q. Yes. A. Yes, I did.

Q. What was that?

MRS. PIEL: I will object to any conversation on the ground of hearsay. I don't see what relevance it has to anything that takes place after the incident or any conversations which took place afterwards.

MR. LITVAK: I want to know what she told people about the incident which she has described to me. It may be relevant because it may be inconsistent with what she said.

MRS. PIEL: I don't think you can prove it by what she told COFO people. I will instruct her not to answer. We can go before a judge.

MR. LITVAK: Fine, we can go before the judge. I have a whole series of questions about what happened.

MRS. PIEL: Suppose you put on the record exactly what the questions are? I don't want to go before a judge unless I know what questions I am objecting to.

MR. LITVAK: Mr. Reporter, please read back [140] the last question I asked.

(The pending question was read back by the reporter as requested.)

MRS. PIEL: To which I object and instruct the witness not to answer.

BY MR. LITVAK:

Q. Did you have any conversations at COFO headquarters upon your return from the station house relating to the incidents that had happened during that day?

MRS. PIEL: May I instruct the witness at this point? You may answer yes or no.

A. Yes.

Q. Will you tell me the substance of that conversation?

MRS. PIEL: To which I will object on the same ground.

Q. Will you tell me the names of the people with whom you had these discussions?

MRS. PIEL: I will object to that on the ground that it is irrelevant to the matter at hand, to the cause of action or to the defense.

Q. How long did you stay at COFO headquarters [141] discussing the incidents?

MRS. PIEL: To which I will object again on the ground of irrelevance.

Q. Did you go back to Palmer's Crossing that night? A. Yes.

Q. Did you discuss with any of the people at Palmer's Crossing the events of August 14th? A. Yes.

Q. With whom?

MRS. PIEL: I will object to that on the ground it is irrelevant and direct the witness not to answer.

Q. Will you tell me the substance of the conversations you had with the people in Palmer's Crossing relating to the incidents which you have described earlier?

MRS. PIEL: To which I will object on the same ground and instruct the witness not to answer.

Q. Did you after that day, after August 14th, have any further conversations while still in Hattiesburg—and by that I mean Palmer's Crossing, relating to the alleged happening on August 14th? A. Yes.

[142] Q. You had them for a period of time periodically—is that correct, these conversations? A. Yes.

Q. With various people at Palmer's Crossing? A. Yes.

Q. And various COFO people as well? A. Yes.

Q. Will you tell me the names of these people?

MRS. PIEL: I will object to that on the grounds it is irrelevant and instruct the witness not to answer.

BY MR. LITVAK:

Q. Again I will request the substance of those conversations wherein you purported to relate the incidents of that day which gave rise to this lawsuit.

MRS. PIEL: I will object to that question and instruct the witness not to answer.

Q. How long after August 14th did you stay in Hattiesburg? A. Left—I believe it was August 21st—August 20th or 21st, Thursday or Friday.

Q. Had you planned to leave at that time? A. I had planned to leave somewhat earlier, but after I was arrested I felt that—there was originally to be [143] a hearing the following Thursday and I was going to stay down certainly through that.

Q. That would have been August 20th? A. The 20th, yes.

Q. Was there a hearing on August 20th? A. No, a petition was filed to have the case transferred to Federal Court.

Q. Who filed the petition? A. Mrs. Piel.

Q. When had you first contacted Mrs. Piel? A. I met Mrs. Piel the following Monday.

Q. In Hattiesburg? A. In Hattiesburg—at Palmer's Crossing.

Q. You left Hattiesburg on the 21st; is that correct? A. I don't remember whether it was the 20th or the 21st.

Q. Either of those two days? A. Yes. I think it was Friday the 21st that I left.

Q. Did you come straight back to New York? A. Yes.

Q. Did you have any conversations in New York with anyone relating to the events described in the complaint in this case? [144] A. Yes.

Q. Will you tell me the names of those people?

MRS. PIEL: To which I will object on the same grounds I have objected previously and instruct the witness not to answer.

Q. And what was the substance of those conversations?

MRS. PIEL: To which I will object on the grounds mentioned.

Q. Have you been back to Hattiesburg since? A. No, I have not.

Q. Have you been back to Mississippi since? A. No.

Q. Has there been any hearing in the case in Mississippi? A. No.

Q. Is the case still pending? A. Yes.

Q. Is it in Federal Court, do you know? A. It is my belief that it is in Federal Court, yes.

MRS. PIEL: Off the record.

(Discussion off the record.)

Q. You have not been required, at any rate, to make any trips or incur any expenses to go to [145] Mississippi to defend that case? A. Not as yet, no.

Q. Have you incurred any expense as a result of that proceeding in Mississippi? A. Well, yes.

Q. What is that? A. I had to post \$100 bond and then there have been other expenses in connection with it.

Q. What other expenses is that? A. Miscellaneous fees.

Q. Such as? A. Filing fee.

Q. Is that for the filing of a petition in the Federal Court? A. Yes.

MRS. PIEL: Off the record.

(Discussion off the record.)

[146] BY MR. LITVAK:

Q. In addition to the \$100 bond which you posted, am I correct in understanding that so far the only additional monies which you have had to lay out in connection with

the Mississippi proceeding is \$5? Is that right? A. Yes.

Q. There may be additional expenses which you are not presently aware of as to amount or nature? A. Yes, I am aware that there will be other expenses.

Q. But you don't know exactly how much or what, and when the nature of it is known to you, you will let us know?

MRS. PIEL: We will let you know at a certain time, sir. Off the record.

(Discussion off the record.)

Q. Are you a party in any other civil rights case? A. Just these cases, the vagrancy charge and this case.

Q. There was no suit arising out of the Richmond incident, I gather? A. No.

[147] Q. Upon your return to New York did you resume teaching? A. Yes.

Q. And you continued at that? A. Yes.

Q. Were there any penalties or repercussions on your job here in New York as a result of your arrest? A. No, not yet.

Q. Did you tell any of the people in the United Federation of Teachers about your arrest, the incident? A. Yes.

Q. Have you told anyone at the school board about it? A. The Board of Education, no, I have not.

Q. Have you related to various people in the United Federation of Teachers the events which you allege in the complaint here? A. Yes.

Q. Will you tell me the names of those people?

—MRS. PIEL: I will object to that as irrelevant and instruct the witness not to [148] answer.

Q. Will you tell me the substance of the conversations you had with those people?

MRS. PIEL: The same objection, same instructions.

Q. Have you since that time been involved in any other integration attempts? A. I have been in New York City, and things are a little bit different in New York. I have not been involved in any integration attempts in New York City.

Q. Have you been involved in any anywhere else other than August 14, 1964? A. Be involved with what?

Q. Any integration attempts anywhere else since August 14, 1964. A. No.

Q. Have you returned to the south at all since August 14th? A. No.

Q. Are you going to be returning to the south this summer?

MRS. PIEL: To which I will object on the grounds that you are asking for a prediction. [149] You are not asking—

MR. LITVAK: Then I will rephrase it.

Q. Do you have any present plans for returning to Mississippi in the summer? A. Yes.

Q. Do your plans involve returning to Mississippi? A. Yes.

Q. Hattiesburg? A. Yes.

Q. To teach? A. I plan to spend some time in the same community where I was last summer. If they wish me to teach, I shall teach.

Q. Is this for COFO again? A. No.

Q. Is it through any organization? A. Through my—acting as an individual.

Q. This is solely on your own? A. Yes.

Q. Do you know the names of either the librarians or people that you met in the library? A. The girl at the desk referred to the librarian as Mrs. Tracy.

[150] Q. That is the woman who was called on the telephone? A. Yes, that is right, the woman who was called on the telephone and who came up after the girl first spoke to us.

Q. Were you alone in a cell? A. Yes, I was alone.

Q. Did you see a doctor while you were in Hattiesburg after this? A. No.

Q. Did you see a doctor at any time related to this? A. No.

Q. Did you receive any medication immediately after the arrest? A. No.

Q. By the way, on the Friday morning, August 14th, you said, I believe, that you went into town about noon. Had you taught in the morning? A. Yes.

Q. These children had been in school? A. Yes.

Q. Miss Adickes, do you have any knowledge [151] of any communication between Kress or any of its officers or directors or employees, with anyone connected in any way with the Hattiesburg Public Library? A. No, I have no knowledge, no direct knowledge.

Q. No what? A. No direct knowledge.

Q. Do you have any knowledge? A. No.

Q. During the entire course of time you were in or about the Hattiesburg Public Library, did anyone say anything about or mention the name of Kress or any of its officers or employees? A. No.

Q. Am I correct in my understanding that you did not reach the decision to go to the Kress Store until well after you had left the library? A. That is right.

Q. Do you have any knowledge of any communication between Kress or its officers, directors or employees, with any member of the Hattiesburg Police Department or an officer of the police department? A. No.

Q. Do you have any knowledge of any communication between Kress or any of its officers, directors [152] or employees, with any public official of the City of Hattiesburg? A. No.

Q. Or of the State of Mississippi? A. No.

Q. Did any officer, director or employee of Kress make any statement to you or to anyone else to your knowledge which in any way mentioned the Hattiesburg Public Library or the Hattiesburg Police Department? A. No.

Q. Do you have any knowledge at the time that you went to the Kress Store on August 14, 1964, that any employee of Kress was even aware of the alleged events at the library? A. No.

[153] Q. Did any member of the Hattiesburg Police Department or any other public official of Hattiesburg make any statement to you or anyone else, to your knowledge, which in any way related to Kress or any of its officers, directors or employees? A. No.

Q. Having told us what the waitress said to you, as you recall it, is it fair to say that neither the waitress nor any-

one else employed by Kress told you that the alleged refusal was in any way based upon compliance with any law of the State of Mississippi or the City of Hattiesburg?

MRS. PIEL: I will object to that question as to form, "Is it fair to say"—ask this witness precise questions that will call for precise answers.

MR. LITBAK: Without conceding the validity of your objection, let me see if I can rephrase it.

Q. Did the waitress or any other employee of Kress state to you that the alleged refusal to serve was based upon any law of Mississippi or of the City of Hattiesburg? A. No.

MR. LITVAK: This would be a good time for us to adjourn to Judge Tyler's chambers for [154] rulings.

(Whereupon, the lawyers, the witness, accompanied by the reporter, went to Judge Tyler's chambers where they were informed that Judge Tyler would give the ruling on Friday morning, May 28th, in his chambers, at 10:00 a.m., after which the proceeding continued as follows.)

MR. LITVAK: The examination is closed subject to the rulings of Judge Tyler. If Judge Tyler's rulings are adverse to us, there will be no further examination; and if his rulings are not adverse to us, there will be a further examination.

(Whereupon, at 3:35 p.m., the examination was closed as noted above.)

Sandra Adickes

Subscribed and sworn to before me
this 7th day of October, 1965.

Leatrice Zipser

Notary Public, State of New York

No. 31-4393945

Qualified in New York County

Commission Expires March 30, 1967

[Present: Hon. H. Tyler, Jr., Justice, U.S.D.C.]

[158] MR. LITVAK: Judge, there are about ten questions in number, but they are one general variety. In other words, they all raise basically one issue.

THE COURT: What is the one issue?

MR. LITVAK: It is as follows: The plaintiff, on deposition, testified to what allegedly happened on the day in question. She testified that she had been arrested. Then I asked her after the arrest, after she left the jail, had she talked to any COFO people or any other people as to the incidents that allegedly happened on that day on what she is suing for. Her counsel permitted her to answer the question, "Yes."

I then asked the names of the people and that was refused, and I asked for the substance of the conversations and that too was refused.

THE COURT: Wait a minute. Let us see if I understand this correctly. Whether or not there were any conversations immediately before going into the variety store lunch counter or immediately after, or both?

MR. LITVAK: Well, I have already covered [159] immediately before, Your Honor. This is after. I wanted to know, after she had been arrested and let go, who she talked to about the incidents and what she told them or what they told her, on the incidents of the day in question that give rise to the lawsuit. I want to know the names of the witnesses and the possible substance of the conversations.

THE COURT: Why shouldn't he have those?

MR. KATZ: Well, Your Honor, we took the position that—

THE COURT: It may well not be relevant.

MR. KATZ: —any conversations that occurred after her release—this is not after the incident but later in the day when she was released from jail.

THE COURT: I see.

MR. KATZ: One question relates to a point in time days or weeks later, namely, if she had any conversation about this after returning to New York. She returned to New

York approximately a week after the incident in question. We believe the post-incident questions are not relevant.

THE COURT: I would agree with you, but as [160] you know, the Federal rules do not make relevancy a test on depositions.

MR. KATZ: Well, I agree, Your Honor, that there is a liberal approach as to what questions may be asked, but I think in this instance there is certainly some outer framework by which the questions must be gauged.

THE COURT: As a matter of common sense, you may have something there. Why do you have to go so long in point of time?

MR. LITVAK: I am trying to get a week or so later, but the reason is this: I want to find out two things. I want to find out the names of people she talked to. She may have made admissions against interest. I want to depose them. I want to find out what she said for the following reasons: She may have said something inconsistent, or they may have told her something. They may have said to her, do you know that such and such happened, or do you know this. For example—

THE COURT: Don't give me examples. You [161] don't have to. I understand. I think you are entitled to have this within reasonable limits. But as your adversary says, we have to have some kind of cutoff or we can wander around forever.

MR. LITVAK: I asked what happened later in the day of the incident.

THE COURT: That I will permit, even though I agree it may well turn out to be irrelevant.

Mr. LITVAK: It may be. Then I asked, when she came back to New York, prior to the time the suit was started, if she admitted that she had conversations with various people here, some of whom were down in Hattiesburg, as to what happened, what was said, what her thoughts were. I will draw the line. I am not going into anything beyond—the lawsuit was filed in November. This is only a two-month period we are talking about. I don't intend to go into anything a year or more later. I would like to keep it from

the date in question, August 14th, up to November 1st, two months.

THE COURT: How do you know that she may not [162] have been consulting counsel?

MR. LITVAK: If that is the answer, I am not going into privileged communications. I think I am entitled to know if she did. The substance may be privileged.

THE COURT: I think what we can do is this—I will permit inquiry into the identification of the persons, the nature of the conversations on the day in question, August 14th, whether it was just prior to, during the episode in the variety store lunch counter or afterwards. I will also permit questions going to conversations about the incident which she had with any persons who are members of these organizations which were involved in last summer's events at Hattiesburg.

MR. LITVAK: You mean the organizations that were involved.

THE COURT: Yes. She might have talked to somebody from COFO, CORE, SNCC, whatever.

MR. LITVAK: Yes. United Federation of Teachers.

THE COURT: All right. Any one of those. I don't think however that you should be [163] permitted to go all the way up to the time of suit being filed. Why not cut it off?

MR. LITVAK: Well, August 14th was the incident in question. Can we cut it off, Your Honor, shortly after Labor Day? I am not going to—

THE COURT: When did she return to New York?

MR. LITVAK: The following week. August 21st it appears.

MR. KATZ: August 21st.

THE COURT: Why don't we limit it between then and, let's say, Labor Day, to be a bit arbitrary about it, of last year; so that that will get ample time to cover any conversations where she might reasonably have been expected to make some admissions or something against what she now says. So do I make myself clear?

MR. KATZ: Yes, sir. I have the one question that was objected to specifically and I take it this would have to be modified to meet with Your Honor's ruling. The question at Page 143, "Did you have any conversations in New York with anyone?" [164] I take it that "anyone" is now modified to mean any person who was a member of or connected with COFO or any constituent organization which makes up COFO.

MR. LITVAK: Or the United Federation of Teachers.

MR. KATZ: The United Federation of Teachers had nothing to do with the project itself in Mississippi. It merely supplied funds and gave some assistance to the New York City school teachers who went there.

THE COURT: Well, yes, but I think it is generally close to what is going on here and obviously it would be ridiculous to question this lady about any and all conversations she had with just personal friends.

MR. LITVAK: Oh, No.

THE COURT: Let us make it limited to all the organizations, including the teachers organization.

MR. KATZ: Thank you.

MR. LITVAK: Thank you.

(Whereupon, at 10:15 a.m., the deposition was adjourned sine die.)

* * *

[Hon. H. Tyler, Jr., Justice, U.S.D.C., not present]

[167] BY MR. LITVAK:

Q. Miss Adickes, at the last session of this deposition you had told us by your arrest by the police in Hattiesburg, Mississippi, during the summer of 1964; and as I recollect, just to save time, after you were released from the police house upon bail, you went from there directly to the COFO headquarters. A. That is right.

Q. And who did you see at the COFO headquarters? A. I saw the students who accompanied me and a number of the COFO staff and some volunteers.

Q. Can you tell me the names of the members of the COFO staff and volunteers that you saw there? A. I don't recall the names.

Q. Can you tell us those that you remember? A. Sanford Lee, who was in charge of the office.

Q. The COFO office? A. Yes. He was in charge of the Hattiesburg project. I remember Doug Smith, who was also on the staff. There were a few other people who were members of [168] the COFO staff and I do not remember their names.

Q. Did you have a discussion with these people concerning the events of the day? A. Yes.

Q. Did you talk to them all at once, that is all in one meeting? A. It was very confused. I was in a very excited state so that I don't remember too clearly whether the conversation was directed to one person at a time. There was some, of course, when I came in. There was a great deal of discussion and the children, naturally, spoke to me first and wanted to make sure that I hadn't been abused.

Later I spoke to—after I talked first with the children, I spoke to the members of the staff and some of the volunteers. There were quite a few questions asked. I don't remember the order. I wasn't lead to a chair and asked to recount my experiences. People questioned me at different times. I do not remember specific questions. I don't remember if I spoke to one person briefly or at length.

Q. Had the children already told any of the COFO people that you had been arrested? A. Yes.

[169] Q. I assume that you related to these people the events of the day, is that substantially correct? A. Yes.

Q. And then they asked you questions, is that right? A. Yes.

Q. Can you recall the general substance of those questions, without recalling specific questions? A. First, they wanted to make sure that I was all right, wasn't hurt.

Q. Physically? A. Yes.

Q. You told them that you were? A. I told them that I had not been physically abused. Most of them by that

time knew what had happened, so I think instead of asking me for an account, a fresh account, they would ask me specific questions. I don't remember too much. It was about when we went down, what happened, that kind of thing.

Q. Was anything said about the facts that you had been in violation of COFO instructions? A. No.

Q. Nothing was said about that? A. No.

[170] Q. Was there any mention of Kress? A. I am sure that there was. I don't remember what was said.

Q. Do you recall the substance of any remarks made? A. No, I don't.

Q. Did anyone in the COFO headquarters tell you anything about the events of that day, anything that they understood that had happened on that day? A. The children told me what had happened after we parted, what had happened to them.

Q. What had happened to them? A. That they had gone into, as I remember it, that they had gone into a drugstore to call the office and that they had been followed by police.

Q. By the police? A. Yes. As I remember it, I believe they said that they separated, they went by different routes to the COFO office. They told me that they had come back to the office and that they had informed everyone of what had happened. A number of them—since my bond money wasn't there in the office, a number of them had—that is not the students—a number of the people in the office had taken a collection to get the \$100 bond until mine came down. I don't remember [171] too many other things that happened.

Q. Maybe I can short-cut this a little by asking you this: From the time of that conversation up until Labor Day of 1964, the various conversations that you had with people associated with you, civil rights organizations, the United Federation of Teachers, was there any discussion concerning S. H. Kress & Company? A. There was when people asked me what had happened. I certainly told them what had transpired in Kress.

Q. What you told me? A. Yes.

Q. Did any of them, however, tell you anything about Kress, or tell you anything about the incident? A. No, not to my recollection.

Q. You don't recall any such statements? A. No.

Q. Was there any discussion while at the COFO headquarters after the arrest, that is, on August 14, 1964, concerning the possibility of bringing any lawsuits as a result of the incidents on that day?

MRS. PIEL: Just a moment. Now, you are talking about discussions with COFO, you are not talking about any discussion with lawyers. [172] I will object to it if by that question you are including conversations with lawyers.

Q. Were there any lawyers at the COFO headquarters at that time? A. Yes.

Q. Which lawyers? A. There were three lawyers and I do not remember their names.

Q. The people who bailed you out? A. Yes.

Q. Did you have any conversations with them? A. Yes, they asked me what had happened.

MR. LITVAK: I don't want to go into that, but I will just say that it appears to me that they were not her attorneys. It wouldn't seem privileged to me.

*MRS. PIEL: You are making an assumption that is not correct.

MR. LITVAK: It would seem to me that when she doesn't know their names, they wouldn't be her counsel.

Q. Apart from these gentlemen, did you have any conversation with anyone else at COFO headquarters concerning the possibilities of bringing any lawsuits? [173] A. I don't remember any such conversation.

Q. How long did you stay at the COFO headquarters on that day? A. Probably not more than an hour.

Q. Did you then go back to the Palmer's Crossing community? A. Yes.

Q. Did you have any conversation with any of the people there concerning the events of the day? A. Yes.

Q. Was there any discussion at that time concerning the bringing of any lawsuits based on the incidents of that day? A. No, there was none.

Q. Did any of those people tell you anything concerning any happenings on August 14th? A. You mean related?

Q. To the incident that we have discussed. A. No.

Q. Again, in order to save time, from that day on up to Labor Day, do you recall anyone supplying you with any information concerning any alleged happenings on August 14th concerning this lawsuit? A. Do you mean was there any conversations with anyone [174] about bringing a lawsuit?

Q. No, I am sorry. I don't mean that. I mean from the day in question, August 14th, on up through Labor Day of 1964, did you have any conversations with people wherein they told you any information relating to the incidents which you have described in the complaint.

MRS. PIEL: Just a moment. When you say conversations with persons, you are referring to COFO people and other organization people?

MR. LITVAK: And the United Federation of Teachers.

MRS. PIEL: As defined by the Judge's ruling?

MR. LITVAK: Those immediately concerned. I don't mean personal friends. A. No.

Q. You returned to New York on August 21st; is that correct? A. Yes.

Q. When is the first time—withdrawn. Did you have any conversations prior to September 7, 1964, relating to the bringing of the instant lawsuit?

MRS. PIEL: Now, to that I will object, if it [175] includes conversations with lawyers.

MR. LITVAK: I am not asking the substance. I am asking whether there were any conversations. I just want to know whether there were any conversations.

MRS. PIEL: I will withdraw that objection. That calls for a yes or no answer.

Q. Just, were there or weren't there?

MRS. PIEL: That includes lawyers or anyone.

A. Yes.

Q. There were? A. Yes.

Q. Were any of these conversations with anyone asso-

ciated with the United Federation of Teachers? A. No.

Q. The organization or anyone in the organization? A. No.

Q. Were any of these conversations with any COFO workers? A. No.

Q. Were they with any of the students or people at Palmer's Crossing? A. I don't know.

Q. What was your answer to the pending question? [176] A. No.

Q. Did you have conversations during this time period concerning the bringing of a lawsuit with anyone other than a lawyer? A. No.

Q. You had not? A. No.

Q. Just with counsel, is that correct? A. Yes.

Q. You mentioned, Miss Adickes, the bail money which you said had not arrived as of August 14th; is that right?

A. It arrived August 14th but it was not there when I was in jail. It arrived later in the day.

Q. And it came from someone in New York? A. Yes.

Q. Who was that? A. Mr. Stanley Tolkin.

Q. Can you tell me who Mr. Tolkin is? A. He is a friend of mine.

Q. He resides here in New York? A. Yes.

Q. Do you know his address? A. No, I don't.

[177] Q. Is he a teacher? A. No.

Q. And as I recollect you told me that you had placed \$500 with him prior to going down; is that correct? A. Yes.

Q. Had you contacted him on August 14th in order to get the money? A. Yes.

Q. By telephone? A. Yes, it was a telephone conversation.

Q. Is he connected with any of these civil rights organizations? A. No.

Q. And you said that he was not a teacher? A. No.

Q. Miss Adickes, are you aware of any further attempts by the COFO organization to integrate the Hattiesburg Public Library?

MRS. PIEL: I will object on the basis of the form. You are asking a question which is assuming a fact.

Q. Do you know whether there were any such attempts?

A. By whom?

[178] Q. Let us take COFO. A. What do you mean by COFO?

Q. Do you know of any attempts by anyone to integrate the Hattiesburg Public Library? A. Yes.

Q. By whom? A. By students and other summer volunteers.

Q. Who were the summer volunteers? A. Who they were?

Q. Yes. A. A young man by the name of Ben Achtenberg and a young man by the name of Bill Jones. There was another person whose name I forget at the moment.

Q. These were all teachers at Palmer's Crossing? A. They were not teachers at Palmer's Crossing.

Q. Who were they? A. They were volunteer teachers in Hattiesburg.

Q. Who else was in that attempting to integrate the library? A. Students.

Q. Do you know their names? A. No, I don't.

Q. Do you know when this attempt took place? [179]

A. It took place on the Monday after the Friday that I went to the library.

Q. Did you have any discussions with any member of this group prior to the Monday on which they attempted to integrate the library? A. Yes, I spoke to these people.

Q. Did you speak to them about integrating the library?

A. No, except as I explained. I am sure that I spoke to them about the events of the day that I have told you.

Q. About August 14th? A. Yes.

Q. Did they tell you that they were going to integrate the library? A. No, they did not.

Q. Do you know what came of their attempt to integrate the library? A. What came of it?

Q. Yes. A. They were arrested.

Q. They were all arrested? A. The adults were arrested, yes.

Q. All the adults were arrested? A. Yes.

[180] Q. How about the children, were they arrested, too? A. The children were not arrested.

Q. Were any of these children the same children that had been with you? A. No.

Q. They were not? A. No.

Q. Were the volunteers that were arrested also taken to the same jail which you were taken to? A. Yes.

Q. Were they released on bail, if you know? A. Yes.

Q. Did you talk to them about it after the arrest? A. Yes, I did.

Q. Am I correct in understanding you earlier that you did not know that they were going to attempt to integrate the library prior to the actual attempt? A. No.

Q. You did not know that? A. I did not know that.

Q. Did any of these volunteers, who attempted to integrate the library and who you talked to after their attempt— [181] A. After their attempt or mine?

Q. Their attempt. —did they give you any information or alleged facts concerning the incidents on August 14, 1964? A. No.

Q. They did not? A. No.

Q. Had any of them to your knowledge been to Kress on the day in which they attempted to integrate the library? A. They may have been but I don't know.

Q. You don't know? A. No.

Q. Did any of these volunteers make any statement to you concerning any conspiracy between Kress and the library with respect to them? A. They did not.

Q. Miss Adickes, on the day in which you attempted to integrate the library, that is August 12, 1964, were you and the children who were with you—as I recall it, there were six girls and a boy? A. Five girls and a boy.

Q. With regard to the girls, were you and the girls all dressed alike on that day? [182] A. Yes, I think we were.

Q. What were you wearing? A. We were wearing blue shirts and blue skirts.

Q. And the boy, what was he wearing? A. I forget what he was wearing.

Q. Had you dressed alike by pre-arrangement? A. Yes.

Q. You had planned to dress alike? A. Yes.

Q. Was there any particular reason? A. This is the blue work short and the blue shirt that has a significance in the

movement. I don't know if I can quite explain it to you. It is not a uniform but it is an expression of one's participation in the movement.

Q. Did you dress that way in school when you were teaching children? A. Yes.

Q. You wore the same basic uniform? A. It wasn't a uniform. We didn't wear it every day.

Q. Periodically? A. Yes.

Q. Would the children wear it every day? A. No.

Q. Periodically? [183] A. Yes.

Q. Some would wear it some day and some would wear it another day? A. Yes.

Q. On August 14th you all wore the same uniform? A. Yes.

Q. As part of the uniform that you described, what would it be normally for a boy? A. A shirt and trousers.

Q. Blue? A. Sometimes blue.

Q. Both the shirt and the pants were blue? A. Sometimes they would wear cover-alls, sometimes dungarees, sometimes ordinary trousers and a tee shirt. There was no school uniform. It varied.

Q. I believe you stated, Miss Adickes, at the last meeting that one of the children subsequently told you that she had seen a police officer in the Kress store; is that correct? A. Yes.

Q. Do you recall which one of the children it was? A. It may have been one or more. I don't remember which one told it to me.

[184] Q. Do you recall when it was that they told you that? A. This was, I believe, back at the COFO offices. It was some time after I was released.

Q. No one made any comment in the store at the time? A. No, I don't believe so.

Q. Turning back to the day in question, namely, August 14th, when you were in the Kress store— A. Yes.

Q. —did the waitress or indeed did anyone else tell you at any time, or were you aware of any facts which indicated that this refusal to serve you at the Kress store was in any way pursuant to any public statement by any official of the

City of Hattiesburg, or the State of Mississippi, or something of that nature? A. No.

MRS. PIEL: Would you break that down just a little bit. You asked whether or not the waitress told you or whether she was aware. I think it is a little bit of a confusing question.

MR. LITVAK: All right.

Q. Did the waitress tell you, or are you yourself aware of any facts which indicate that the refusal to [185] serve you in the Kress store at that time was pursuant to any statement, utterances, or proclamation by any official of the City of Hattiesburg or the State of Mississippi?

MRS. PIEL: That won't do. You have whether the waitress told her or whether she was aware.

MR. LITVAK: All right.

Q. Did the waitress tell you? A. No.

Q. Were you aware of any facts relating to that? A. Now, you will have to break this down again. What do you mean by that?

Q. The waitress did not tell you, we have that out of the way? A. Yes.

Q. Now, are you aware of any facts which indicated that the refusal to serve you at that time was pursuant to any statement or utterances or proclamation by any official of the City of Hattiesburg or officer or official of the State of Mississippi? A. I am aware that the policy of refusal to serve me in that connection was part of a state-wide policy—I might even say regional policy. That I think in my original response to interrogatories I quoted the former the former Governor Barnett. I quoted a number of people. [186] One heard statement time after time about this policy of integration, counter to serving people with integrated groups:

Q. My question was: Were you aware of any facts that this refusal was pursuant to this policy that you told me about? A. I know that this was in accord with that policy, that it is a state-wide established policy.

Q. Are you aware of any facts that are pursuant to that policy?

MRS. PIEL: I believe the witness has answered the question.

MR. LITVAK: She said that it is in accordance with it. If that was the statement and this was the fact, maybe they were in accordance. Maybe they were in accordance? I am asking her if she was aware that it was because of—pursuant of—whether she is aware of any facts along those lines. A. You will have to redefine “facts”. I know that this policy to not serve me was in accordance with the policy, official or otherwise, of Mississippi, the residence of Mississippi.

Q. You say that you know that it was in accordance [187] with. How do you know that it was in accordance with that policy? A. At this point I just don't know how to answer you. For more than a hundred years this has been the issue of the South.

Q. Yes? A. That one does not treat the Negro as an equal, and one does not treat civilly those who would treat a Negro as an equal. Anyone who dares to change this policy is going against the established way of life in Mississippi, and most of the South. Now, I will just have to go through every history book if you want me to back that statement up.

Q. Do you have any more information other than what you have already told me? A. No.

Q. I think you stated that you were aware that prior to August 14th the Negroes had been served in the Kress store; isn't that right? A. Yes.

Q. Are you aware today that Negroes and whites were served in the Kress store? A. No, I am not.

Q. They were served together? [188] A. No.

Q. You are not aware that on the same day they were? A. No.

MRS. PIEL: I wish to perhaps belatedly object to that question with regard to form, again, when you ask her if she was aware.

MR. LITVAK: The formal objections are noted. This was not my witness, this is cross examination.

MRS. PIEL: I will object to that question and ask that the answer be stricken.

Q. You refer to a statement by Governor Barnett. A. Former Governor Barnett.

Q. At a time when he was in or out of office, if you recall? A. He was out of office.

Q. Out? A. Yes.

Q. Do you recall when this statement was made? A. I think it was made just prior to when we went down, some time in June of 1964.

Q. At a time when he was no longer governor? A. Yes.

MR. LITVAK: Off the record.

[189] (Discussion off the record.)

BY MR. LITVAK:

Q. Miss Adickes, I believe at our last session you undertook to supply us with copies of certain newspapers of the United Federation of Teachers containing articles that you wrote about the summer of 1964? A. Yes.

Q. Have you been able to obtain that yet? A. No, I have not.

Q. I understand that you have made efforts to do so? A. Yes.

Q. And if you are able to get a copy, you will let us know and supply us with it? A. Yes.

MR. LITVAK: And the affidavit I understand that Mrs. Piel will furnish us as soon as possible?

MRS. PIEL: Yes.

MR. LITVAK: I have no further questions right now. Of course, there are these two outstanding matters: Subject to looking at the affidavit and any articles, if we get them, I have no further questions at this time.

MRS. PIEL: Off the record.

[190] EXAMINATION BY MR. LITVAK:

Q. Miss Adickes, when you were arrested, you were taken in by the two policemen in the car to the jail house; is that correct? A. Yes.

Q. And then, I believe you stated that later at the COFO headquarters the children told you that they had been followed by the police after your arrest? A. Yes.

Q. Do you know which police followed them? A. No, I do not.

Q. The two officers in the car both went with you to the jail house? A. Yes.

Q. You don't know the names of the policeman or policemen who followed the children? A. No, I do not.

Q. Did those two policemen who arrested you stay with you in the jail house for a period of time? A. When I was placed in the cell, I didn't see them.

Q. You saw them from the time you were placed in the car with them until you were placed in the cell? A. Yes.

MR. LITVAK: As I stated earlier, I have no [191] further questions at this time. We reserve the right, and I understand that you, Mrs. Piel, reserve the right to object to our calling Miss Adickes again should we have any further questions from any documents that we secure from any source at a later date.

MRS. PIEL: I do object and ask you to close the examination now.

MR. LITVAK: As I say, I have no further questions. I closed it, adding that I reserved the right to recall, and you reserve to object. I think both our rights are protected. I understand that you are waiving any rights to cross examine at this point and the deposition will be closed on that basis.

MRS. PIEL: As far as Miss Adickes is concerned, the examination is closed as far as I am concerned.

(Whereupon, the deposition was closed.)

Sandra Adickes

Subscribed and sworn to before
me this 7th day of October, 1965.

LEATRICE ZIPSER

Notary Public, State of New York

No. 31-4393945

Qualified in New York County

Commission Expires March 30, 1967

[Caption omitted in printing]

NOTICE OF MOTION**SIRS:**

PLEASE TAKE NOTICE that upon the annexed affidavits of Louis P. Johnson, Hugh W. Herring, Emmett Boone and Ralph A. Hillman, the attached Defendant's Statement of Material Undisputed Facts, Pursuant to General Rule 9(g) and upon all prior pleadings and proceedings herein, the undersigned will move this Court pursuant to Rules 12 and 56, Federal Rules of Civil Procedure, at a motion term to be held in Room 506 of the United States Courthouse, Foley Square, Borough of Manhattan, on the 4th day of January, 1966, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order granting judgment in favor of defendant, S. H. Kress and Company, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 29, 1965

[Subscription omitted in printing]

AFFIDAVIT

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

LOUIS P. JOHNSON, being duly sworn, deposes and says:

I am the President of the defendant S. H. Kress and Company ("Kress"). I make this affidavit in support of defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The defendant Kress is a private corporation incorporated under the laws of the State of New York. Kress privately owns and operates a variety store in Hattiesburg, Mississippi, containing eating facilities. Kress subleases its Hattiesburg store from Genesco, Inc., a Tennessee corporation. It does not lease any land or building from any governmental body, including the State of Mississippi or any agency thereof or the City of Hattiesburg.

It is and has been the policy of Kress not to discriminate against any person because of race, color or creed. This policy is clearly set forth in a memorandum dated July 15, 1964, sent to all store managers, including Mr. Gordon T. Powell, Manager of the Hattiesburg store. A copy of this policy statement is attached hereto as exhibit A.

Louis P. Johnson

[Subscription omitted in printing]

Exhibit A:

S. H. KRESS and Company
 A DIVISION OF J. C. PENNEY CO.
 114 Fifth Avenue
 New York, N. Y. 10011

LOUIS P. JOHNSON
 PRESIDENT

July 15, 1964

TO ALL STORE MANAGERS

COMPLIANCE WITH CIVIL RIGHTS ACT OF 1964

Now that the Civil Rights Act has become effective, it is most important that we fully comply with all its provisions affecting our Company.

As you know, there are two Articles which directly affect our stores. The first pertains to Public Accommodations. It is now the Law, and also Company policy that we will not refuse to serve anyone because of race, color or creed. We may no longer segregate facilities such as Food Departments, rest rooms, cloak rooms, toilets, lounges and drinking fountains. This applies on the sales floor and throughout the store - whether public or employee facilities. This portion of the Law took effect the minute it was signed.

So as to be sure that we are presently in compliance with the law regarding facilities, you are to immediately check to be sure that Food Department, drinking fountains, lunch rooms, cloak rooms, toilets, lounges, etc. are not designated either for colored or white. Any signs which still are on the doors or walls are to be removed. If they cannot be removed, paint and/or patch over such signs to be sure that no designation is left which can be read by anyone. Use "Men" or "Women" where necessary.

The other Article is relative to Equal Employment Opportunity. This Section of the Law does not become effective until July 2, 1965. No discrimination may be practiced with regard to the employment or conditions of employment of anyone because of race, color or creed. Our policy, as has been stated previously to you, has always been based on ability rather than race, color or creed. This applies to the selection and promotion of employees.

Yours truly,

Louis P. Johnson

Louis P. Johnson

P.S. After you are sure that your store complies in every respect, sign the attached and return as instructed.

STATE OF MISSISSIPPI
FORREST COUNTY

My name is Hugh W. Herring, duly appointed and acting Police Chief of the City of Hattiesburg, Mississippi, and was acting in such a capacity on or about August 14, A. D., 1964.

I have been contacted by John H. Williams, Jr., a representative of Genesco, owner of S. H. Kress and Company, who requested that I make a statement concerning alleged conspiracy in connection with the arrest of Mrs. Sandra Adickes. He had with him Mr. G. T. Powell, Manager of S. H. Kress in Hattiesburg, who was also the Manager on that day. Mr. Powell had made no request of me to arrest Mrs. Sandra Adickes or any other person, in fact, I did not know Mr. Powell personally until the day of this statement. Mr. Powell and I had not discussed the arrest of this person until the day of this statement and we had never previously discussed her in any way.

The above statement is true and correct to the best of my knowledge.

WITHESS my signature on this the 18th day of November, A. D., 1964.

/s/ HUGH W. HERRING

WITNESSES:

/s/ Francis Zachary

/s/ Audrey Tisdale

I, Hugh W. Herring, being duly sworn, depose and say that I made and subscribed to the foregoing statement and that it was and is true and correct.

/s/ Hugh W. Herring

Sworn to before me this
25th day of October, 1965.

/s/ Francis L. Zachary
Notary Public

My Commission Expires October 9, 1969

The State of Mississippi



Department of State

To All To Whom These Presents Shall Come: Greeting:

Be It Known, That Francis T. Zachary

whose signature is subscribed to the attached document, was duly commissioned

by the Governor of the State of Mississippi, as a NOTARY PUBLIC for

Forrest County, Mississippi, on the 1st day

of October 1965, for a period of four years; and that

said appointment is of record in the office of the Secretary of State.

WITNESS my signature and seal of office, this the

3rd day of November 19 65

Walter L. Linder
Secretary of State

STATE OF MISSISSIPPI
FORREST COUNTY

My name is Emmett Boone, Sergeant, Hattiesburg, Mississippi Police Department, and I was acting in such capacity on or about August 14, A. D., 1964. I was a Sergeant on duty and in the presence of Patrolman Ralph Hillman on Main Street in the City of Hattiesburg when an arrest was made of Mrs. Sandra Adickes.

I was contacted on this date by Mr. John H. Williams, Jr., a representative of Genesco, owners of S. H. Kress and Company, who requested that I make a statement concerning alleged conspiracy in connection with the aforesaid arrest.

This arrest was made on the public streets of Hattiesburg, Mississippi, and was an officers discretion arrest. I had not consulted with Mr. G. T. Powell, Manager of S. H. Kress and Company in Hattiesburg, and did not know his name until this date. No one at the Kress store asked that the arrest be made and I did not consult with anyone prior to the arrest.

This statement is true and correct to the best of my knowledge.

WITNESS my signature on this the 18th day of November, A. D., 1964.

/s/ EMMETT BOONE

WITNESSES:

/s/ Francis Zachary

/s/ Audrey Tisdale

I, Emmett Boone, being duly sworn, depose and say that I made and subscribed to the foregoing Statement and that it was and is true and correct.

Sworn to before me this /s/ Emmett Boone
25th day of October, 1965.

/s/ Francis L. Zachary

Notary Public

My Commission Expires

October 9, 1969

The State of Mississippi



Department of State

To All To Whom These Presents Shall Come: Greeting:

Be It Known, That Francis T. Zachary

whose signature is subscribed to the attached document, was duly commissioned

by the Governor of the State of Mississippi, as a NOTARY PUBLIC for

Forrest County, Mississippi, on the 1st day

of October 19 65, for a period of four years; and that

said appointment is of record in the office of the Secretary of State.

WITNESS my signature and seal of office, this the

3rd day of November 19 65

7ches Lachun
Secretary of State

STATE OF MISSISSIPPI
FORREST COUNTY

My name is Ralph Hillman, Patrolman, Hattiesburg, Mississippi Police Department, and I was acting in such capacity on or about August 14, A. D., 1964. I was a Patrolman on duty and in the presence of Sergeant Emmett Boone on Main Street in the City of Hattiesburg when an arrest was made of Mrs. Sandra Adickes.

I was contacted on this date by Mr. John H. Williams, Jr., a representative of Genesco, owners of S. H. Kress and Company, who requested that I make a statement concerning alleged conspiracy in connection with the aforesaid arrest.

This arrest was made on the public streets of Hattiesburg, Mississippi, and was an officers discretion arrest. I had not consulted with Mr. G. T. Powell, Manager of S. H. Kress and Company in Hattiesburg, and did not know his name until this date. No one at the Kress store asked that the arrest be made and I did not consult with anyone prior to the arrest.

This statement is true and correct to the best of my knowledge.

WITNESS my signature on this the 18th day of November, A. D., 1964.

/s/ RALPH HILLMAN

WITNESSES

/s/ Francis Zachary

/s/ Audrey Tiscale

I, Ralph A. Hillman, being duly sworn, depose and say that I made and subscribed to the foregoing statement and that it was and is true and correct.

/s/ Ralph A. Hillman

Sworn to before me this,
25th day of October, 1965

/s/ Francis L. Zachary
Notary Public
My Commission Expires
October 9, 1969

The State of Mississippi



Department of State

To All To Whom These Presents Shall Come: Greeting:

Be It Known, That Francis T. Zachary

whose signature is subscribed to the attached document, was duly commissioned

by the Governor of the State of Mississippi, as a NOTARY PUBLIC for

Forrest County, Mississippi, on the 1st day

of October 1985, for a period of four years; and that

said appointment is of record in the office of the Secretary of State.

WITNESS my signature and seal of office, this the

3rd day of November 1985

Debra Lachin
Secretary of State

**Plaintiff's Answers to Defendant's Interrogatories
Propounded February 10, 1965**

III. With respect to Paragraph VII of the complaint:

3. Question: State whether plaintiff requested to use the library facilities.

Answer: No.

7. Question: Give the name and address of each person who refused them use of such facilities and the name and address of the librarian who requested the group to leave the library.

Answer: Unknown.

8. Question: State separately whether plaintiff claims that any officer, director or employee of Kress refused, or caused anyone else to refuse the use of library facilities to plaintiff or said Negroes.

Answer: Plaintiff claims that an officer, director of [sic] employee of Kress refused, cooperated, or caused in some manner, the details of which are unknown to her, the refusal of library facilities to plaintiff and her companions.

9. Question: * * * state:

(a) the name of each such officer, director or employee of Kress.

(b) if plaintiff claims said person caused the refusal, state the manner in which said refusal was caused.

Answer: Plaintiff has no knowledge at this time of the names of any such officer, director or employee nor does she presently have any knowledge as to the manner in which said refusal was caused.

IV. With respect to Paragraph VIII of the complaint:

1. Question: State whether plaintiff claims any force was used upon her when the group was asked to leave the library.

Answer: No.

2. Question: State whether plaintiff and her group stopped at any other store or place after leaving the library and before entering defendant's store.

Answer: After leaving the library and before entering defendant's store, plaintiff and her group stopped at Woolworth's.

3. Question: . . . state:

(c) the purpose for stopping at such store or place;

Answer: For the purpose of eating lunch.

(d) the reason for leaving such store or place;

Answer: Too crowded.

(e) whether any incident similar to any alleged in the complaint occurred.

Answer: Not to plaintiff's knowledge.

4. Question: State the approximate time of day when plaintiff entered defendant's store.

Answer: 12:30 p.m.

7. Question: State whether plaintiff claims that either she or said Negroes were requested or ordered to leave the booth or defendant's store; if so, state the name, address and occupation of each person who it is claimed made such a request or issued such an order.

Answer: No.

AFFIDAVIT OF RALPH HILLMAN

**STATE OF MISSISSIPPI
FORREST COUNTY**

SS.:

My name is Ralph Hillman, Patrolman, Hattiesburg, Mississippi Police Department, and I was acting in such capacity on or about August 14, A. D., 1964. I was a Patrolman on duty and in the presence of Sergeant Emmett Boone on Main Street in the City of Hattiesburg when an arrest was made of Mrs. Sandra Adickes.

I was contacted on this date by Mr. John H. Williams, Jr., a representative of Genesco, owners of S. H. Kress and Company, who requested that I make a statement concerning alleged conspiracy in connection with the aforesaid arrest.

This arrest was made on the public streets of Hattiesburg, Mississippi, and was an officers discretion arrest. I had not consulted with Mr. G. T. Powell, Manager of S. H. Kress and Company in Hattiesburg, and did not know his name until this date. No one at the Kress store asked that the arrest be made and I did not consult with anyone prior to the arrest.

This statement is true and correct to the best of my knowledge.

WITNESS my signature on this the 18th day of November, A. D., 1964.

/s/ RALPH A. HILLMAN

WITNESSES:

/s/ Francis Zachary

/s/ Audrey Tisdale

I, Ralph A. Hillman, being duly sworn, depose and say that I made and subscribed to the foregoing statement and that it was and is true and correct.

/s/ Ralph A. Hillman

Sworn to before me this,
25th day of October, 1965

/s/ Francis L. Zachary
Notary Public
My Commission Expires
October 9, 1969

Excerpts From Calendar Order
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Cal. #147(2)

DKT. #64C.3426

SANDRA ADICKES,

Plaintiff,

v.

S. H. KRESS & COMPANY,

Defendant.

The attorneys in the above-captioned case are hereby notified that this case will shortly be called for Assignment and Pre-Trial Conference pursuant to Calendar Rules 6 and 13. Counsel will be notified by the Deputy Clerk for Calendars of the exact time and date of this conference.

The following steps are to be taken in preparation for such conference and failure to comply with these requirements may lead to the imposition of penalties contained in Calendar Rule 16.

• • •

III. Within fifteen (15) days of the date of this order, the attorneys for all parties shall meet together at a convenient time and place for the purpose of simplifying the issues to be tried. At this conference between counsel, all exhibits should be exchanged and examined and counsel shall also exchange a list of the names and addresses of all witnesses to be called at the trial including herein the specialties of experts to be called.

• • •

The memorandum shall be as concise as possible, and shall state the date the conference between the attorneys was held, and cover the following items:

(h) A list of the witnesses which each party intends to call along with the specialties of experts to be called.

[Caption omitted in printing]

Federal Court Building,
Foley Square, New York.

July 13, 1965,
10 o'clock a.m.

oOo

Deposition of GORDON T. POWELL, taken by Plaintiff,
pursuant to Notice dated June 29, 1965.

oOo

[2] Appearances:

Messrs. Donner & Piel,
Attorneys for Plaintiff,
36 West 44th Street,
New York, N. Y.

BY: Eleanor J. Piel, Esq.,
Sanford Katz, Esq., of Counsel.

Messrs. Donovan, Leisure, Newton & Irvine,
Attorneys for Defendant
2 Wall Street,
New York, N. Y.

BY: Sanford M. Litvack, Esq.,
Alfred H. Hoddinott, Jr., Esq., of Counsel.

MRS. PIEL: Before we commence, Mr. Litvack, Pursuant to the notice served upon you, we request the appearance of Jo Ann Baggett. Will she be here today?

MR. LITVACK: No, she will not be here, Mrs. Piel. We believe the notice of deposition, to which you just referred, to be defective on its face, and a nullity, so far as S. H. Kress and Company is concerned. The notice does not even purport to take the deposition of the defendant Kress by an officer or managing agent. But, rather, it merely gives notice of the intention to depose two named persons, who you say are employees of Kress. As such, we consider your notice a nullity, so far as it purports to impose an obligation on Kress to produce [3] anyone. We feel the only obligation upon the defendant is to appear, and cross-examine, if we desire, certain witnesses you have noted. However, apart from the notice of deposition, which we consider a nullity, Kress has voluntarily produced, at its own expense, only in order to expedite matters, and give you a chance to get any information which is proper, we have produced Mr. Powell, who is sitting here with me, and is the manager, as you know, of the Hattiesburg store.

MRS. PIEL: Very well, we shall proceed at this time with Mr. Powell. Do we have the usual stipulations?

MR. LITVACK: Yes.

oOo

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties herein, that the sealing, filing and certification of the within deposition be waived; that such deposition may be signed and sworn to before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before a Judge of this Court.

IT IS FURTHER STIPULATED AND AGREED that all objections except as to form, are reserved to the time of the trial. *

[4] IT IS FURTHER STIPULATED AND AGREED that counsel for plaintiff shall furnish a copy of the within deposition to counsel for defendant, without charge.

oOo

GORDON T. POWELL

being first duly sworn by a Notary Public of the State of New York, was examined and testified, as follows:

EXAMINATION BY MRS. PIEL

Q. Please state your full name for the record. A. Gordon T. Powell.

Q. Where do you reside? A. 102 Saratoga Circle, Hattiesburg, Mississippi.

Q. Mr. Powell, how old are you? A. 31.

Q. How long have you lived in Hattiesburg, Mississippi? A. A little over two years.

Q. Where were you born? A. Texas.

Q. Where were you educated? A. Pardon me?

Q. Where were you educated? Where did you receive your education? A. Greenfield, Texas.

Q. How far did you go in school? [5] A. I graduated from high school, and I had three years of college.

Q. Where did you go to college? A. Texas State Teachers.

Q. When did you graduate college? A. I didn't graduate.

Q. Prior to your coming to Hattiesburg, were you employed elsewhere? A. Yes.

Q. Where elsewhere? A. I was employed by Kress at Arkansas City, Kansas; Hudson, Kansas; and Dallas, Texas; and, also, Greenfield, Texas.

Q. When did your employment with Kress commence? A. I started, part-time, in 1949. And in 1957 I signed up as management trainee, and worked full-time since then.

Q. Have you ever worked for any other employer since you left college? A. No.

Q. When did you leave college? A. 1957.

Q. So you have been continuously in the employ of the Kress Company since 1957; is that correct? A. Yes.

[6] Q. Do you know Doris Anthony? A. Yes.

Q. Who is she? A. She is a department supervisor in our store in Hattiesburg.

Q. How long has she been department supervisor? A. I don't know in that capacity. She has been employed there approximately 18 years.

Q. When did you first meet her? A. When I arrived in Hattiesburg.

Q. Do you know a Dolores Freeman? A. Yes.

Q. Is she known as Dolores or Nancy Freeman? A. I can't remember which name she went by.

Q. Who is Dolores or Nancy Freeman? A. She was an employee at the lunch counter.

Q. How long did she work for you? When I say you, I mean Kress & Company? A. Just a few months.

Q. Did there come a time when she left the employe of Kress? A. Yes.

Q. What were the circumstances of her leaving? A. She left for better employment.

[7] Q. Do you know what that better employment was?

A. I believe she went to a manufacturing company there in town.

Q. Do you know what manufacturing company? A. I believe it is Reliance.

Q. When did she leave the employ of Kress? A. I don't know the exact date. It was September or October, I believe.

Q. Of what year? A. 1964.

Q. Do you know Emmett Boone? A. Just by name.

Q. What do you know, when you say just by name. What does the name mean to you? A. I believe he is a member of the Hattiesburg Police Force.

Q. What leads you to believe he is a member of the Police Force? A. Just as far as I know he is a member of the Hattiesburg Police Force.

Q. Have you ever met him? A. No.

Q. Did you ever talk to him? A. No.

[8] Q. Do you know Hugh Herring? A. Yes.

Q. Who is he? A. He is the Chief of Police of Hattiesburg.

Q. Have you ever met him? I mean, you said you knew him. Did you see him very often? A. No.

Q. During the two years that you have been in Hattiesburg, how many times have you spoken to Mr. Herring? A. Approximately four times.

Q. Do you recall the four times, and the circumstances? A. Yes, in the early part of 1964 he came through the store and introduced himself. I had met him at that time. And it was a mere handshake. And then, later in the Spring of 1964, I had planned a plant sale in connection with the store —three of us planned the promotion—the plant promotion, including the Laurel store. And, in Hattiesburg, there was a law, ordinance where you can't sell from the sidewalk, or display merchandise on the sidewalk, or sell from the curb. So I called the Chief on the telephone and told him what the law seemed to be to us, in Hattiesburg, and I told him what the store planned, if I could get permission to park [9] a trailer truck at the side door of the Kress store and display the merchandise on the sidewalk, and he said yes. He said yes, it would be all right, fine, that they wanted to help draw business downtown, and that was it, on that conversation.

Q. You opened the conversation by saying that you thought it was against the law, or you knew it was against the law, or, what was the statement you made? A. No, I just asked him permission to do it.

Q. You said there is a law in Hattiesburg against it? A. I understand there was a law, there is no selling on the sidewalks or curbs.

Q. Who told you about this? How do you know about that? A. Well, at different times people would put things on the sidewalk and had to remove them. In fact, we had done that at one time, prior to that.

Q. Have you told us your entire conversation with Chief Herring on that occasion? A. At that time?

Q. Yes. A. Yes.

Q. What was the next occasion that you recall talking with Chief Herring? A. Well, the promotion came off. It

was ng. The promotion started, and our trailer truck showed [10] up, and I had all my plants—I had them on the sidewalk—and that afternoon Chief Herring called me on the telephone and said he had had a complaint, and I was going to have to take my plants off the sidewalk. Well, there I was with a couple of thousand dollars of plants, and, in my store, you can't sell that quantity from the inside, and the driver of the truck was in Laurel with the truck, and I had his trailer there, and there was no way of moving the trailer. And I naturally, under the circumstances, lost my temper, and told him that I didn't think it was fair, that he had given me permission to hold that promotion, and there wasn't a thing I could do with the plants other than take a loss on them. Well, the Chief was really hot tempered, and he start cursing and raising cane with me, and I told him where he could go. And he told me where I could go. And I moved my plants.

Q. Did there come to be another time when you had another discussion with Chief Herring? A. The next time, I believe it was in the Fall of 1964. I am not sure of the date.

Q. What were the circumstances of that conversation? A. Mr. Williams, from Genesco, Manpower Corp. came to Hattiesburg after the article came out in the paper about this [11] lawsuit, and we went to the Police Station to take a statement from the Chief.

Q. What were the circumstances of the conversation you had with him on that occasion? A. The circumstances?

Q. What happened? What was the conversation that you had with Chief Herring on that occasion? A. Well, I actually did not do any talking while I was there.

Q. Did you hear anyone else do any talking? A. Yes.

Q. What was said? A. Mr. Williams and I and my District Manager—

Q. What is his name? A. C. B. Gentry.

Q. What date was this that this took place, if you know?

A. I don't know the date.

Q. What was said? A. I called the Chief on the tele-

phone and made an appointment to see him, and we went down there.

Q. When you say down there, where was that? A. To the Police Station. We went to his office. And Mr. Williams introduced himself, who he was, and asked if I or any member of the Kress store there in Hattiesburg had had [12] anything to do with this Miss Adickes' arrest, and the Chief said that he was not talking.

Q. He was not talking? A. He was not talking. He was very blunt and to the point, he just wasn't going to do anything, one way or the other. And Mr. Williams—I don't remember the words—anyhow, he talked to him a little, and sort of finally gave him a better frame of mind, so the Chief just called up—

Q. What did he say to him to get him in a better frame of mind? A. I don't remember the words. This has been too long ago. But, anyhow, then the Chief had phoned up and told the City Attorney and asked him to come down to the office.

Q. What is the City Attorney's name? A. Zachry. And Mr. Zachry came down and asked Mr. Williams what he wanted, and Mr. Williams told him the same thing he had told the Chief. And then Mr. Zachry said, "Is that all you want?" And he said yes. He turned to the Chief then and said, "Did Mr. Powell have anything to do with the arrest?" And the Chief said no. He said, "Well, did anybody at the Kress store have anything to do with the arrest?" And the Chief said no. [13] He said, "If that is all they want, a statement from you, and they didn't have anything to do with it, we will give him a statement."

So he quoted—gave a statement to the secretary there, and the Chief signed it, and then they called in the two patrolmen that made the arrest, and he went over the same thing with them, whether I or any member of the Kress store had anything to do with the arrest, and they said no. And he dictated statements for them, which they read and signed.

Q. When they were called in, the two policemen, all of

the rest of you were present in the room; is that correct?

A. Yes.

Q. By that, it was you, there was Mr. Gentry— A. Mr. Gentry.

Q. —and Mr. Williams? A. Mr. Williams.

Q. And, Mr. Francis Zachry—is it Francis Zachry? A. Yes.

Q. And the Chief of Police? A. Yes.

Q. Was there an Audrey Tisdale present? A. Audrey Tisdale?

Q. Do you know an Audrey Tisdale? A. No.

[14] Q. Was there a secretary present in the room? A. Yes.

Q. Will you repeat for us, as much as you remember, the conversation that took place after the patrolmen came into the room? A. There was very little. Mr. Zachry just asked them the same thing he had asked the Chief.

Q. Was there any other occasion that you had any further conversations with Mr. Herring? A. With Mr. Herring?

Q. Yes. A. No.

Q. With regard to the Kress policy in the store in Hattiesburg, where you worked, for the serving of negroes, what was that policy when you first came to work in Hattiesburg?

MR. LITVACK: Fix the date when he first came to work in Hattiesburg, please.

MRS. PIEL: I thought he said it was approximately two years ago. Let me ask him the question.

Q. When was the date?

MR. LITVACK: If you recall.

Q. In the Spring of 1963.

Q. What was the policy towards the service of negroes in the Spring of 1963 when you went there? [15] A. We served everyone that came in the store. We didn't have a lunch counter at that time.

Q. When did you install the lunch counter? A. In April of 1964.

Q. When you first installed the lunch counter in April of 1964, did you have any policy with regard to the service of negroes? A. No.

Q. What was there in the store at the time you came as manager? Were there segregated water fountains?

MR. LITVACK: I object to that. This is totally irrelevant. And it has been so held by the Court. So, just in the interest of saving time, I will object and instruct the witness not to answer.

MRS. PIEL: You are instructing the witness not to answer?

MR. LITVACK: Correct, on the basis of the Court's prior ruling.

MRS. PIEL: Then you are taking the responsibility that this is a witness whom you are producing? You are taking the position that you produced this witness, and you are objecting, and instructing him not to answer?

MR. LITVACK: There is no doubt but that I produced this witness, which is not pursuant to the notice for [16] deposition. I am instructing him not to answer, correct.

Q. Were the lavatory facilities segregated at the time you came there?

MR. LITVACK: Same objection, on the same grounds. I instruct the witness not to answer.

Q. When you installed the lunch counter in April of 1964, did you serve any negroes in April of that year? A. No, none came in and asked for service.

Q. Did you serve any negroes at the lunch counter in May of 1964?

MR. LITVACK: I object to the form of the question, Mrs. Piel, because, first you have to ask whether anyone asked to be served, and whether he refused the service.

MRS. PIEL: My question is whether he served—

MR. LITVACK: He can't refuse, if none came in. I am objecting to the form of the question.

MRS. PIEL: He can answer.

MR. LITVACK: (You may answer the question, but I object to the form of the question.

A. None came in.

Q. When did the first negro come into your lunch counter in Hattiesburg, in the Kress store? A. July, the day the law went into effect—July 2nd.

Q. What happened on that occasion? A. Nothing. They came in and sat down, ordered two cokes and hamburgers I believe.

Q. Who came in at that time? A. Two colored boys.

Q. Prior to that time, did your store in any way discriminate against negroes in the store?

MR. LITVACK: I object to the form of the question. You may answer the question.

Q. In the store? Q. Yes.

Q. Yes. A. No.

Q. After July 2, 1964, or around that time, did you have any conferences with members of your staff concerning the issue of serving negroes?

MR. LITVACK: You mean people employed in Kress after July 2nd?

MRS. PIEL: I said at or about that time.

A. I don't understand the question.

Q. At or about the time the Civil Rights Act went into effect, did you have any conference or any meeting with your staff on the subject of the service of negroes? [18]

A. Yes.

Q. When did you have the first meeting of that kind? A. I believe it was around the week before that, when the law went into effect.

Q. What took place at that meeting? A. I talked with each individual that works at the lunch counter, and told them that there would be—anyone that came into the store and sat at the counter, regardless of race, creed or national origin, was to be served, everyone was to be served.

Q. You said this to each person? A. To each individual.

Q. Prior to that time, in April or May, did negroes shop in the store? A. Yes.

Q. And they had been shopping in the store from the time you first became manager; is that correct? A. Yes.

Q. I show you a notice dated July 15, 1964, on Kress & Company stationery, and ask you whether you've seen that before? A. Yes, I have seen it.

MRS. PIEL: Would you mark this as Plaintiff's Exhibit 1 for identification.

(Paper dated July 14, 1964, "To all store Managers," was marked Plaintiff's Exhibit 1 for identification, [19] this date.)

Q. Incidentally, when you were speaking to each person about serving of persons that came into the store, did you speak to Dolores Freeman about it? A. She was not employed at that time.

Q. When did she come on the payroll? A. The middle of July.

Q. Did you receive Plaintiff's Exhibit 1 on or about July 15, 1964—receive a copy of it? A. This is the same one you just handed me?

Q. Yes. A. Yes, I seen a copy.

Q. Did you have occasion to fill out the form on the second page? A. Yes.

Q. Do you have a copy of what you filled out? A. Do I have a copy of this?

Q. Yes. A. No.

Q. You filled it out and sent it in to Kress? A. Yes.

Q. To the head office; is that correct? A. Yes.

Q. Were there any meetings of the staff after that [20] first meeting you discussed? After this was received, did you have any further meetings with the staff? A. Yes, I did.

Q. How many other meetings did you have with the staff on the subject of the service of negroes? A. Just one. I had no meetings on the service of negroes.

Q. What did the meeting that you had concern itself with on the subject of the service of persons coming into the Kress store?

MR. LITVACK: I will object to the form of the question. If you understand the question, answer it.

MRS. PIEL: Read the question.

(Whereupon the pending question was read by the reporter).

A. After the initial meeting, which was prior to July 2nd, I had—well, I didn't have a meeting with but one person.

Q. You had a meeting with one person? A. Yes.

Q. Who was that one person? A. Miss Baggett.

Q. What took place at that meeting? What did you say to her and what did she say to you? A. Prior to the meeting there was quite a lot of violence [21] on around Hattiesburg, in Hattiesburg, and throughout the South in general, in connection with what we call whites or Civil Rights workers in the South. There had been violence. Personally I know of approximately three instances there in Hattiesburg, where white people walking down the streets with colored people, in what you call a mixed group, had been attacked, beat up, with chains, or bats, fists and what have you, just because they were together. And, I mean, this was not uncommon. It was happening day in and day out. And the newspapers were full of it, and the radio was full of it, and the television was full of it, and everyone was up in the air about it.

People didn't like it. The sentiment of the population of Hattiesburg was opposed to it. It was just something that never happened there before. And there had been instances where these mixed groups had gone into places for service and had been attacked and beat up either on the inside or outside of the establishment.

I felt that I should talk with Miss Baggett on this. We had had mixed groups in there, previously, and these attacks were building up day in and day out there. So I called her in to the office and told her that there was a very good chance that eventually that—I don't [22] recall exactly what I said, or the circumstances—but, there was a very good chance of one of these groups coming into the store and asking for service, and there was a good chance of violence breaking out in the store, a riot could result from it, and particularly during any busy time of the day. In the early morning, or in the afternoon, when there is very few people in town, or in my store, of course the chances were very slim. In order to have a mob, you have to have people.

So I told her that I was staying very close to the sales floor. I tried to spend at least ninety percent of my time on the sales floor, and particularly during the busy hours. I told her that if an incident came about where a mixed

group came into the store and we were busy, and even looked like we were going to have some sort of trouble, to look for me for guidance, and I would try to make a decision. We had a choice of, if there was going to be violence or a riot in the store, I could make a decision of closing the counter and refusing to wait on the group, or any decision I felt I had to make at the time. And I instructed her then to inform her sales girls about this, and to look for her when anything like this happened, and she would get instructions from me.

Q. What was Miss Baggett's title or official position? A. She was the food counter supervisor.

[23] Q. When did this conversation with her, that you are just reporting, take place? A. I am not sure of the date. It was some time in the latter part of July.

Q. Was it after you had received Plaintiff's Exhibit 1, and filled it out? A. I can't swear to that, I don't know.

Q. Did you consult with anyone else in the Kress management or anyone concerning the policy you just described, the conversation you had with Miss Baggett?

MR. LITVACK: I object to the form of the question, by characterizing it as a policy. But I guess the substance of the question is, did you discuss the subject with anyone else at Kress after the conversation with Miss Baggett.

Q. Did you? A. In the store of the company?

Q. In the company or in the store. A. No.

Q. Do you know Ralph Hillman? A. Yes, I know him by name.

Q. Who is he? A. He is a patrolman on the Hattiesburg Police Force.

Q. Does he have anything to do with your Kress store [24] or did he ever have anything to do with your Kress store?

MR. LITVACK: I object to the form of the question. I don't understand what you mean, did he ever have anything to do with the store.

Q. Has he ever been inside the store?

MR. LITVACK: To your knowledge, has he ever been inside the store? A. Yes.

Q. On how many occasions that you know of? A. I don't know that. Maybe every day. I don't know. The only reason I know he was in there was when I saw him.

Q. Do you remember seeing him every day? A. No.

Q. Do you remember seeing him often in the store? A. No.

Q. How often in the two years you have been manager of the store have you seen him in that store?

MR. LITVACK: I think the witness has indicated he can't make the estimate, he would be guessing.

Q. Have you seen him often?

MR. LITVACK: You asked that question before, and it has been asked and answered.

Q. Do you know what Officer Hillman's beat was? Do you know what his routine was, what his duties were, with regard to [25] patrolling the streets in Hattiesburg? A. No.

Q. Was this the only meeting that you had with Miss Baggett on the subject that you have discussed concerning the service of customers in the Kress store? Did you have any meeting other than that? A. Yes, just two meetings.

Q. Any others but the two meetings? A. No.

Q. Did something unusual happen on August 14, 1964?

MR. LITVACK: I object to the form of the question.

Q. Do you recall any occurrence on August 14, 1964, in the store at Hattiesburg? A. Yes.

Q. What do you recall happening? A. It was on Friday. The store was very busy. I would say at approximately 12, or a little after—as I previously mentioned, there is this Reliance Manufacturing Company, which is approximately two blocks from the store there. It is a large manufacturer of clothing, and every other Friday they have pay day, and they pay prior to lunch, and a large amount of the people that work there come into the store and we cash their checks at lunch. So, naturally, every other Friday we are very busy between the hours of 12 and one o'clock. [26]

On this particular day, just shortly after 12 o'clock, I estimate there was 75 to 100 people in the store, and the lunch counter was pretty—was pretty well to capacity there,

full, and I was going up towards the front of the store in one of the aisles, and looking towards the front of the store, and there was a group of colored girls, and a white woman who came into the north door, which was next to the lunch counter.

And the one thing that really stopped me and called my attention to this group, was the fact that they were dressed alike. The all had on, what looked like a light blue denim skirt. And the best I can remember is that they were—they were almost identical, all of them. And they came into the door, and people coming in stopped to look, and they went on to the booths. And there happened to be two empty there. And one group of them and the white woman sat down in one, and the rest of them sat in the second group.

And, almost immediately there—I mean this, it didn't take just a few seconds from the time they came into the door to sit down, but, already the people began to mill around the store and started coming over towards the lunch counter. And, by that time I was up close to the candy counter, and I had a wide open view there. And the people had real sour [27] looks on their faces, nobody was joking, or being corny, or carrying on. They looked like a frightened mob. They really did. I have seen mobs before. I was in Korea during the riots in 1954 and 1955. And I know what they are. And this actually got me.

I looked out towards the front, and we have what they call see-through windows. There is no backs to them. You can look out of the store right into the street. And the north window, it looks right into the lunch counter. 25 or 30 people were standing there looking in, and across the street even, in a jewelry store, people were standing there, and it looked really bad to me. It looked like one person could have yelled "Let's get them," which has happened before, and cause this group to turn into a mob. And, so, quickly I just made up my mind to avoid the riot, and protect the people that were in the store, and my employees, as far as the people in the mob who were going to get hurt themselves. I just knew that something was going to break loose there.

Q. What did you do? A. I made my decision.

Q. What did you do? A. And I looked across, and Miss Baggett was looking at [28] me, and I just merely nodded my head no.

Q. What do you mean when you say you nodded your head no? A. In this meeting with Miss Baggett, the second meeting, I told her to look for me for guidance in this thing, and I would have to make a decision. I told her that if I gave her a motion not to serve them, not to, and I was implicating any white person that was with the group.

Q. You were what? A. I told her not to serve the white person in the group if I gave her—if I shook my head no. But, if I didn't give her any sign, to go ahead and serve anybody. So I did give her the no signal.

Q. Why did you decide not to serve the white person? A. I figured at this time, as I stated before—it was these white people that were getting all this violence thrown at them, were being beat up, for being with the colored people. And there were colored people beat up. But there were a lot of instances, and, in fact, in most instances it was just the white person that was beat up, and the colored people were left alone. And by this time the people were used to us serving colored people in the store, and there was resentment. They [29] didn't like it, as far as I can tell. But, particularly they didn't like the white people, I guess.

Q. Did you think that this would please the people who were watching, if you did not serve—

MR. LITVACK: I object to that.

MRS. PIEL: I have not finished my question.

MR. LITVACK: I am sorry.

Q. —if you didn't serve the white person?

MR. LITVACK: I object, and I instruct the witness not to answer that. He is incompetent to know what would please the white people, or what wouldn't please the white people.

Q. What was your thinking with regard to this decision, with regard to the white people in the store?

MR. LITVACK: I object to the form of the question,

unless you ask him whether he had any thoughts, and if he recalls what they were.

Q. Do you recall what your thoughts were on that subject? A. The only thought I had was the prevention of a riot, if at all possible. And that is my responsibility, that store is. It is my job, and that is what I am being paid for, which was to protect the people in it, where I can, and the property.

Q. Were there any policemen in the vicinity at that time? A. Not to my knowledge, there wasn't.

[30] Q. Were there any policemen in the store? A. I didn't see any.

Q. Did you see any policemen outside the store? A. No.

Q. Then what happened? Will you tell us what happened that day? A. The group got up and left.

Q. Did you see a police officer leave just before the group left? A. No, I did not.

Q. What happened after the group left? A. They got up and walked back up the store aisle they came in, went through the same door, and turned left out of the store.

And there is an alley that runs by the store, crosses Main Street, which runs in front of the store. They turned left towards the alley, and I was watching them, of course, and that is when I noticed a patrol car that evidently was parked in the alley across the street, because he came directly across the traffic and stopped at the alley.

One of them got out, and took Miss Adickes by her arm, and opened the door, and pushed her into the back seat. And they went down the alley. [31] They didn't touch or say anything to the colored girls with her, and just left them standing there. And they sort of looked at each other and turned around and walked around back to the front of the store and were talking in the front of the store.

Q. What was the name of the waitress that was serving the group? A. Dolores Freeman.

Q. What did she do during this time? What was her part in this incident? A. I don't really know that.

Q. What did you see her do? A. She went out and served

water and menus, or served the water to the colored girls, and offered to take their order. And by this time I had made the decision, and Miss Baggett knew it, and Miss Baggett motioned to her, or told her—I am not sure which—not to serve the white woman, and since—evidently since we didn't offer service to the white woman, the whole group left before they were served.

Q. Did you have any conversation with Miss Freeman before this incident concerning the policy of the store with regard to the service of Negroes? A. Personally, no.

Q. Did you have any conversation with her or Miss Baggett [32] after the incident? A. After the incident?

Q. Yes. A. I don't remember any particular incident.

Q. The incident we are discussing. Did you have any conversation with Miss Baggett or Miss Freeman after the group left the store? A. I went over and asked her, Miss Freeman, what she did, and what was said, and I don't remember the exact way she put it, it was something like "I offered to wait on the colored girls, and the white woman asked me if I was refusing a white woman," or something like that, and she said yes, I believe.

And then the woman said something, "Don't you know it is against the law," or something to that effect, and Miss Freeman said, "I don't know about that, I was instructed not to wait on you." And I believe she asked her by whom, and Miss Freeman said the manager, and the white woman asked her what the manager's name was, and I believe she said Mr. Powell, and that was it.

Q. Was there any significance in your mind, or do you think there was any meaning to the dress of the group that came in?

MR. LITVACK: I will object, on the ground it is totally irrelevant whether he thought it was significant, [33] or didn't think it was significant. And, in the interest of moving this along, I will allow him to answer.

A. I didn't understand the question.

Q. You said they were all dressed alike, in white shirts and blue skirts, or something like that. A. That's right.

Q. The group that came in were dressed that way? A. Yes.

Q. Did that mean anything to you? A. None other than they were all dressed alike.

Q. How long was it after you saw them come in before Miss Freeman went over to them? A. It is a counter service. It is fast service. It is the kind of service we like to give.

Q. How long was the period of time? A. Very short. I mean, the whole incident was a matter of a few minutes, the whole time when she was in the store, and the complete thing was over in just a matter of minutes.

Q. What is your testimony as to the time that they waited at the booth? Was it two minutes, one minute, five minutes, ten minutes? A. I can just say a very short time. As far as minutes, I can't say how many minutes. All I can say, I considered it very fast service, good service.

Q. How many negro people, children or adults, were there in that group? A. I don't know the exact number. To the best of my knowledge, the way I remember it, it seems that she and three colored girls were in one booth, and I believe there were two in the other booth.

Q. After the meeting with Miss Freeman, or the conversation with Miss Freeman, and after the conversation with Miss Baggett, did you have any other conversations with anyone on your staff or with Kress about what took place on that day? A. No.

Q. Later in the day did something else happen concerning the service of a negro and a white person? A. Nothing happened, no. There was a white boy and a colored boy who came in and had cokes.

Q. They came in together? A. Yes.

Q. What time was that? A. In the late afternoon, after approximately 3:30.

Q. And since that time have other white persons and negroes come in and been served in your store? A. Yes.

Q. Did you have any other discussion with members of the staff about this incident? [35] A. About what?

Q. About the incident of August 14th. A. This incident?

Q. Yes. A. No.

Q. Inside the store, how many persons did you estimate were there at noon on August 14th? A. I believe I already stated I estimated between 75 and 100, in what we call the merchandise part of the store, and the lunch counter had a capacity of 45, and the best I can remember, the two booths were the only two empty. There may have been two or three stools. We had 14 stools, and two or three of them had been empty. But, as a whole, it was full, busy, at the counter. The whole store was busy.

Q. Did you observe any threatening gesture or any movement on the part of anyone in the group towards the group of negro children and Miss Adickes?

MR. LITVACK: I object to the question on the grounds that he has already told you what he observed. Now you are asking him to characterize threatening gestures.

I don't know what constitutes a threatening gesture. He already told what it was that he observed.

If you want to go into it in more detail, as to what he observed, I have no objection. But I have to object [36] to the form of the question.

MRS. PIEL: I will ask the question again.

Q. Did you see any person in the store or outside the store doing anything unusual? A. It is unusual to me when a group of people begin to move in one direction.

Q. How did the people move? Did they move in one direction? A. They sure did. They were coming out of the merchandise department over towards the lunch counter. They were going into the aisles adjacent to the lunch counter, and out on the sidewalk people were stopping and gathering out there and getting into groups.

Q. How far would you say the people moved or how far did you observe the people on the inside of the store move to the lunch counter? A. My store is approximately 60 foot wide at that point. And, so, it would be 60 feet. They were there when I started looking around. They had to go out of the store.

Q. They were there, inside the store? A. They were in

the store, when they came in, when this group came in, so they were really noticeable.

Of course, the first people that were there when they came in, they stopped, and it hit them the same way, I suppose, that it hit me, that these people were all dressed [37] alike. And when you get several people like that, they are dressed alike, anybody would seem to notice them.

Q. Then your testimony that they first looked around and looked at them? Everyone in the store looked? Everyone in the store looked at them? A. I don't know that everyone did.

Q. About how many people in the store looked at them? A. The people around me were looking.

Q. How many people were around you? A. Ten or 15 people.

Q. Did any of these ten or 15 people around you move toward the group at the counter? A. Yes, they did.

Q. How far did you see anyone person move towards the counter, how many feet? A. I wasn't looking backwards. I was just watching the counter.

Q. With regard to anyone you were observing, how far did you see that person move towards the counter? A. I was not particularly observing any one person.

Q. Did you see anyone move towards the group? A. It was just a blur of people, bunches of people. I wasn't watching any particular person.

Q. You saw bunches of people move towards the group? [38] A. I saw people.

Q. How far did they move?

MR. LITVACK: I will object to that. You have asked him that five times and he has told you.

MRS. PIEL: I have not got an answer.

MR. LITVACK: He has told you he is not able to give you the number of feet.

Q. What is your best estimate, if you can give it to us?

MR. LITVACK: I think he said the store is 60 feet. If someone moved over from one side to the other, they would have moved 60 feet.

MRS. PIEL: The witness has not testified anyone moved 60 feet.

MR. LITVACK: He doesn't know. He said he just saw people move.

Q. Can you estimate the distance you saw people move?

A. I said a while ago I was not looking backwards.

Q. I am just asking about what you saw.

MR. LITVACK: Can you estimate it?

THE WITNESS: No, I can't estimate it.

Q. Did they move towards the group when they got up, or, was there any further action?

What happened when the group got up and left the store, with regard to the people in the store? [39] A. The people more or less, followed them from behind, and, of course, I was closer to the front at that time. I was up at the candy-counter, and I wasn't watching the people behind me at that time.

I was looking at this group, and by the time I got to the front door, and were out of the store, practically the whole front of the store was full of people then.

Q. Had they all left the store? Had all the customers in your store left? A. They were still in the store, because the group left the store.

Q. Did any of the customers in the store leave and follow the group? A. I didn't notice any; I wasn't watching.

Q. At that time, did you know patrolman Hillman by sight—at that time? A. By sight?

Q. Yes. A. Yes, by sight.

Q. Did you see him anywhere in the store that morning?

A. I can't recall seeing him in the store that morning.

Q. Did you at any time call the police when you were concerned about this group? A. No.

[40] Q. I show you what purports to be a statement by you and ask you if you seen that before? A. Yes.

Q. Whose handwriting is this? A. That is Mr. Williams' handwriting.

Q. These are your initials on each page; is that correct?

A. Yes.

Q. And your signature at the end? A. Yes.

MRS. PIEL: Will you mark this, please.

(Document consisting of two pages, re statement by Mr. Powell, was marked Plaintiff's Exhibit 2 for identification, this date.)

Q. You state here that Kress was the first restaurant facility in the city of Hattiesburg to integrate after the passage of the Civil Rights Bill.

Was the store not integrated before the passage of the Civil Rights Bill? A. No one had ever asked for service. No colored person had ever asked for service prior to its passage.

Q. How did the townspeople show you that they didn't favor integration? A. Threatening telephone calls.

Q. Which you received at home? [41] A. At home and at the store.

Q. When did you receive these calls? A. The first time the two colored boys that came in—if it was July 2nd, it was the first day of the passage—it was that very afternoon I got my first phone call at the store.

Q. How many calls came in after this? A. Several. I don't know how many. I didn't count them or anything.

Q. Did you ever change your policy with regard to serving policies after any of these telephone calls? A. There was no policy.

MR. LITVACK: After the passage of the bill, after July 2nd, she is talking about.

A. (Continuing) We served anyone that came into the store.

Q. However, on August 14th, you refused to serve Miss Adickes; is that correct? A. I refused service because of the very explosive atmosphere that was in the store at that time.

Q. That was connected with her being with the group of negroes; isn't that correct?

MR. LITVACK: I object to the form of the question. He has told you why he refused service.

Q. You refused service to her because she, as a white [42] woman, was with a group of negroes; isn't that correct?

A. As a group, I suppose.

Q. You state here that our business is still suffering due to the resentment that exists. Can you explain that? A. How is it suffering?

Q. Yes. A. Losing sales.

Q. How do you calculate that you are losing sales?

MR. LITVACK: I object to that. This has to do with the Kress operations, how it operates is beyond the scope of this case. He has told you they were losing sales.

Q. What was the basis of your statement "Our business is still suffering due to the resentment of the group"?

MR. LITVACK: He has answered that, because they were losing sales.

Q. In what quantity were sales lost?

MR. LITVACK: The dollar volume of sales that Kress lost?

MRS. PIEL: Yes.

MR. LITVACK: I object, and I instruct the witness not to answer.

Q. Can you give us any facts upon which that statement was made?

[43] MR. LITVACK: What statement?

MRS. PIEL: "Our business is still suffering due to the resentment that exists."

MR. LITVACK: He has answered that by yes, they were losing sales. I think that is a fact.

Q. Do the books reflect a decline in the business?

MR. LITVACK: You can answer that. I won't object any more.

A. Yes.

Q. By what quantity?

MR. LITVACK: I will object, and instruct him not to answer.

Q. How do you know that any decline that the books may show is due to any racial policy that the store has?

MR. LITVACK: I object to that question.

MR. KATZ: Why?

MR. LITVACK: First of all, on racial policy they stated

what their policy is. It is quite clear.

MR. KATZ: Not necessarily on what the policy is. He makes a statement, there is a written statement that there is a decline due to their integration of the store. We are asking how he knows that.

MR. LITVACK: How he knows what it is due to?

MR. KATZ: Yes.

[44] MR. LITVACK: Tell him on what basis you believe it is due to your policy.

THE WITNESS: Immediately after we served our first colored customers our business declined.

BY MRS. PIEL:

Q. Is business still declining? A. It is not still declining now, but it has not gone back up.

Q. Do you have books of account, or records which will show how the business has declined?

MR. LITVACK: With regard to this particular store, you mean?

MRS. PIEL: Yes.

MR. LITVACK: As long as I am not waiving any rights to object to the relevancy of any of this, you can answer whether there are any such books.

A. Yes.

Q. They are under your custody and control?

MR. LITVACK: I object to that.

Q. Are they?

MR. LITVACK: He doesn't know. He has no control over those books. That is a legal question that you are asking for.

Q. Are you personally a member of the White Citizens [45] Council? A. No, Madam, I am not.

Q. Did you ever discuss this incident with any customers in the store? And, by this incident, I am referring to what took place on August 14th. A. Not that I can recall.

Q. Has patrolman Hillman been in the store since August 14th, to your knowledge? A. I can't think of any—I can't remember seeing him at any one particular time, when I saw him less or more, or anything.

Q. Other than the statements which have been produced by your counsel, and I shall ask to have them all marked after you looked at them— A. What was that?

Q. I say, other than the statements, are there any other written reports concerning what took place on August 14, 1964? A. This is all that I know of.

BY MR. KATZ:

Q. Mr. Powell, you stated that when you saw the customers in your store you were afraid of violence, or a serious disturbance, or incident, you were afraid of the threat of violence on the part of the customers who were watching the group of negroes and the plaintiff; is that right? [46] A. Afraid of violence on their part?

Q. You were afraid of some incident occurring? A. Yes.

Q. There was, in your mind, a fear that there would be a violent incident of some sort? A. Yes.

Q. Is there any company policy with respect to what the manager's role or function should be when he is faced with an incident of violence or any disturbance in the store?

MR. LITVACK: You mean what a manager should do in the case of a potential riot situation or something of that nature?

MR. KATZ: Yes.

A. Not that I know of. That would be pretty hard to put as a responsibility.

Q. Would it be fair to say that one act that you might do would be to call the police?

MR. LITVACK: I object to the form of the question, as to what is fair to say.

MR. KATZ: Strike out the words "fair to say."

MR. LITVACK: Now, what is the question?

Q. Did you receive any instruction with respect to when you were to call the police? A. No.

Q. You were responsible, as a manager, for the safety [47] of your customers; is that right? A. For anyone involved.

Q. Any customers? A. Yes.

Q. Is that correct? A. Yes.

Q. If, in your judgment, there is an incident that is present which may result in violence, what do you do then?

MR. LITVACK: I object to the question. He told you what he did. If you are talking about a particular incident, ask him that question.

MR. KATZ: I am talking about your policy, management policy.

MR. LITVACK: He is saying there is no policy on what to do.

Q. Is there any policy, Mr. Powell, as to when you should call the police?

MR. LITVACK: The question has been asked and answered already.

MR. KATZ: No, it has not.

MR. LITVACK: Read back the question.

(Whereupon the pending question was read by the reporter.)

MR. LITVACK: I am objecting to the question.

[48] MR. KATZ: Let's mark these now.

(Statement of Irene Sullivan, November 18, 1964, was marked Plaintiff's Exhibit 3 for identification, this date.)

(Statement of Jo Ann Baggett, November 18, 1964, was marked Plaintiff's Exhibit 4 for identification, this date.)

(Statement of Hugh W. Herring, November 18, 1964, was marked Plaintiff's Exhibit 5 for identification, this date.)

(Statement of Emmett Boone, November 18, 1964, was marked Plaintiff's Exhibit 6 for identification, this date.)

(Statement of Ralph Hillman, November 18, 1964, was marked Plaintiff's Exhibit 7 for identification, this date.)

(Statement of Doris Anthony, November 18, 1964, was marked Plaintiff's Exhibit 8 for identification, this date.)

(Statement of Dolores Freeman, November 19, 1964, was marked Plaintiff's Exhibit 9 for identification, this date.)

BY MR. KATZ:

Q. When you first observed the plaintiff and the group of negroes, how far were you from the south check-out counter? A. From the south check-out counter?

Q. Yes. A. I was a good way from there.

Q. Ten feet? A. Practically half the store.

Q. 60 feet? [49] A. About 50.

Q. 50 feet? A. Or 40, something like that.

Q. Was there an aisle from where you were standing in an aisle, which led to the south check-out counter? A. No.

Q. Irene Sullivan states, in her statement, Plaintiff's Exhibit 3, that she saw patrolman Hillman enter the southerly located front door, and she at that time was at the south check-out counter. Do you see that? A. Yes, I see that.

Q. Did you see patrolman Hillman enter at that time? A. No.

Q. Did you see him in the store? A. No.

MR. LITVACK: I object to all these questions, as having been asked and answered on several occasions.

Q. In the statement of Doris Anthony, Plaintiff's Exhibit 8, she also said that she saw patrolman Hillman enter the store, and she says, too, this was his regular beat. Are you aware of that?

MR. LITVACK: Aware of what, that she says that? Are you aware of the statement?

[50] THE WITNESS: Yes, I am aware of that statement.

Q. Were you aware that it was patrolman Hillman's regular beat, at the Kress store?

MR. LITVACK: I object to the form of the question.

A. No.

Q. Did you know that patrolman Hillman had, as a part of his beat, your Kress store?

MR. LITVACK: I object to the form of the question. It pre-supposes a fact which is not in evidence.

MR. KATZ: I am asking whether he was aware of that.

MR. LITVACK: Of what?

MR. KATZ: That the Kress store was part of patrolman Hillman's beat. I am asking if he knew that.

MR. LITVACK: It pre-supposes it is. I object to the question.

Q. Your employee states, Mr. Powell, that, to her knowledge, the Kress store was part of patrolman Hillman's beat. I am asking you if you know that as a fact.

MR. LITVACK: I have no objection to the question.

A. I don't know that as a fact.

Q. Did you at any time give instructions to your employees as to when they were to request police assistance in case of a disturbance? A. No.

[51] Q. At the time you were observing Miss Adickes and the negroes, up to the time they left your store, did any customer in your store make any statement to you? A. To me?

Q. To you. A. No.

Q. Did you speak to any customer? A. No.

Q. You spoke to no one? A. No one.

Q. When did you first become aware that Miss Adickes had been arrested? A. That afternoon or evening, when I arrived home and looked into the Hattiesburg American, the local newspaper. It had a story in there about the library incident, and, from reading this, I found out she had been arrested.

Q. Did any police official call you on August 14th or August 15th, 1964, concerning Miss Adickes? A. No.

Q. Did you call any police official during the month of August 1964 regarding Miss Adickes? A. No.

Q. Was it customary, Mr. Powell, for a police car to be parked in an alley alongside your store?

[52] MR. LITVACK: I object to the question.

Q. Have you ever seen, prior to August 14, 1964, a police car parked in the alley outside of your store?

MR. LITVACK: I object to the question. Off the record.

(Discussion off the record.)

Q. When you saw Miss Adickes being placed in the police car, where was the police car located?

MR. LITVACK: When you saw it.

A. I don't know where it was located. I saw it cross Main Street. I figured it must have been in the alley over there. It would have had to go directly across the traffic.

Q. How far is the alley from your store? A. My store is at the alley.

Q. I am asking you, had you ever, prior to that time, seen a police car parked in the alley?

MR. LITVACK: I will object to the question. He did not say he saw one parked there that day.

Why don't you ask him if he has ever seen one.

MR. KATZ: I said ever.

MR. LITVACK: On that day or any other time, have you seen one parked there?

THE WITNESS: I could have. But, why would I remember it? I don't know.

[53] MR. LITVACK: He just wants to know if you recall.

THE WITNESS: I can't recall, no.

BY MR. KATZ:

Q. Prior to the time that Miss Adickes and the group of negroes left the store, did you think of calling a police officer for assistance?

MR. LITVACK: I will object to the question. But, you can answer the question, if you remember.

A. No, I don't recall thinking about calling the police.

Q. Even though you characterized the situation that then existed as being one of "charged atmosphere," and you were concerned at this time that the safety of everyone in the store would be placed in jeopardy, you didn't think of calling a police officer at that time; is that right?

MR. LITVACK: I object to the form of the question. He has answered the question, he said he didn't think of it.

Q. What were you thinking of at that time, Mr. Powell?

MR. LITVACK: I object to the question. If you want to answer the question what was going through your mind at the time, you may do so.

A. You mean from the time she came into the store and until she left?

Q. Yes. [54] From she got out of the booth to leave the store, I don't know what I was thinking then.

But, leading up to the decision I made, it was so sudden and everything, I made the decision, and the only reason I made the decision was I felt this thing looked like it was going to explode, and the only thing I thought of, or remember thinking of, was the safety of everybody involved, and the property loss.

I didn't want any people getting beaten up in the store, anyone. I felt that by refusing her service the whole thing would burn off, it would be over with.

Q. You didn't think of calling a police officer?

MR. LITVACK: I object to the question as being already asked and answered four times.

Q. You said later on on that day you served a white person who was accompanied by a negro; is that correct?

A. Yes.

Q. Did you know either the white person or the negro?

A. Did I know them?

Q. Yes. A. No.

Q. In your statement, on Page 2, you say on August 14th an explosive situation was present. What did you mean by that?

[55] MR. LITVACK: I object, because he has answered that so many different times, Mr. Katz.

Q. Were you referring to an explosive situation inside your store or an explosive situation outside your store? A. Both:

Q. What was the explosive situation outside the store?

A. The same that was on the inside. People were standing there, mobbing up.

Q. Yet, on that same afternoon you served a negro and white person? A. There were very few people in town, or in my store.

Q. You did serve both of them? A. We served both of them, yes.

Q. Is it the Kress policy to serve both white and colored persons in the afternoon or early in the morning when there are no groups involved? Is that right?

MR. LITVACK: I object, and I direct the witness not to answer. The policy of Kress is clear.

Q. You had made a decision, had you not, Mr. Powell, to serve a white person and a negro that afternoon; is that correct? A. There was no decision to be made.

Q. Didn't Miss Baggett look at you when the white person came in with the negro? [56] A. No.

Q. You testified, did you not, that whenever there was a mixed group that came in there, she would have to look at you for instructions?

MR. LITVACK: That is a complete mischaracterization of the testimony.

The record will clearly state what his testimony was. If you want me to tell you, I will be glad to. If you want the reporter to read it back, he can do so.

I don't want you to try to get the witness to restate something, in the hope he will change it. It is on the record what he said.

MR. KATZ: Let's read the record back.

(The prior record was read by the reporter.)

BY MRS. PIEL:

Q. You said that prior to—I recall you saying that prior to the incident of August 14th there had been three instances that you recall of violence in Hattiesburg. What were those three incidents? A. There was one incident where a rabbi, I believe, a white rabbi was walking down the street with some colored people, and he was beaten up with crow bars, or something like that, by white people.

Just down in the next block, a store there, there was [57] an incident where a white boy was with some colored people, and was beaten up in front of a drug store.

There was another incident in a restaurant, which was another block away from the store, where an integrated group of whites and coloreds had gone in to seek service, and was refused, and came out, and the white people were beaten up.

And I think it was even the same day that that happened that in front of our Post Office an incident occurred.

That was just local incidents.

Q. What was the incident in front of the Post Office?

A. Just a white boy with some colored people, and they jumped on him.

Q. Did any of these incidents of violence take place in a public place? A. Inside a public place?

Q. Yes. A. No, I don't believe I know about it.

MRS. PIEL: That is all. I have no further questions.

MR. LITVACK: I do have some questions I would like to ask Mr. Powell.

MRS. PIEL: Of course, we reserve our rights with regard to the questions that were not answered.

MR. LITVACK: That is what I wanted to raise right now.

[58] If you have any intention of seeking to compell answers—obviously we have gone to great cost in bringing him up here, and I would greatly appreciate, and prefer, if you are going to try to compel answers, that we do it now, while he is here, in case he has to answer the questions, unless you would be satisfied with written answers later.

I would prefer to get the rulings now, if you like.

MRS. PIEL: I am concerned particularly about the question about the facilities.

MR. LITVACK: Which facilities? Do you mean the toilet and bathroom facilities?

MRS. PIEL: Right.

MR. LITVACK: Anything else?

MR. KATZ: Off the record.

(Discussion off the record.)

MR. LITVACK: We have just agreed that, with respect to any questions which are now unanswered by Mr. Powell because of counsel's objections, counsel will, at a later date, after it has the entire transcript, seek answers to those questions which it desires to have answered.

If the Court rules that the questions are to be answered, counsel agrees that those answers may be submitted in the form of written answers to interrogatories.

MRS. PIEL: This statement is predicated on the [59]

assumption that we are going to move. We may not move. However, in the event that the plaintiff moves to have the witness answer certain questions, at this time it would appear to be satisfactory that they be answered by interrogatories.

MR. LITVACK: I certainly have no objection to it if you decide to move part of it, but I assume at this time it is not in any way definite.

MRS. PIEL: I suppose, I can conceive a situation where the answers to the interrogatories are such that there may be something further we may want.

MR. LITVACK: Agreed.

MRS. PIEL: I can't be bound at this time. It is our intention to proceed by interrogatories, if there is something that we have not obtained, that we want, and if the Court will grant us the right to inquire further.

MR. LITVACK: *Just to make sure I understand it, you will proceed by interrogatories, in the first instance. If that is not satisfactory to you, supposedly you will reserve whatever rights you have.*

MR. KATZ: If the Court requires answers, makes such a ruling, the answers can be given in affidavit form, or some document, in which he answers the question under oath.

MR. LITVACK: That's fine.

[60] MR. KATZ: And, as far as Miss Baggett is concerned, the plaintiff's position is that she was required to be produced, and the defendant did not avail itself of any remedy, namely, to move to vacate the notice of examination, and, of course, we deem the defendant to be in default for failure to produce Miss Baggett.

MR. LITVACK: I understand your position. But I believe we have made the defendant's position clear at the outset. I have just a few questions to ask Mr. Powell at this time, and then we can conclude. Right at the outset, I will request that we mark as Defendant's Exhibit A for identification the notice of deposition, to which we have been referring, which the defendant believes to be fatally defective, and which the plaintiff claims to be totally proper.

MR. KATZ: Together with your letter. Off the record.
(Discussion off the record.)

MR. LITVACK: Let's mark the notice of deposition. (Notice of deposition was marked Defendant's Exhibit A for identification, this date.)

MR. KATZ: And mark this as Plaintiff's Exhibit 10. (Letter dated July 2, 1965, Litvack to Katz was marked [61] Plaintiff's Exhibit 10 for identification, this date.)

BY MR. LITVACK:

Q. Mr. Powell, did you ever discuss Miss Adickes, or anyone in her group, with any one employee at the Hattiesburg public library? A. No.

Q. Do you even know anyone employed at the Hattiesburg public library? A. No.

Q. Did you know, as of the time that Miss Adickes came into your store on August 14th that she, or anyone else had been to the Hattiesburg library at any time to integrate the facilities? A. No.

Q. Did you ever hear of it or see Miss Adickes prior to her going into the store on August 14th? A. No.

Q. Did you, on August 14th, or at any time prior thereto, have any discussion with any member of the Hattiesburg police department concerning Miss Adickes? A. No.

Q. Or concerning any Civil Rights worker? A. No.

Q. Did you have any discussion on August 14, 1964, or at any time prior thereto, with any member of the Hattiesburg [62] police department concerning the Kress policy of serving both negroes and whites? A. No.

Q. Did you have any conversation with anyone on or before August 14th relating to the arrest of Miss Adickes? A. Would you repeat that?

Q. Did you have any conversation with anyone on or before August 14th relating to the arrest of Miss Adickes? A. No.

Q. Did you or anyone else in Kress, to your knowledge, request that the police come to this Kress store on August 14th? A. No.

Q. Did you, or anyone else, to your knowledge, in Kress, ask the police to arrest Miss Adickes? A. No.

Q. Did you know that the police were coming to arrest

Miss Adickes on August 14th? A. No, I did not.

Q. Had you served negroes and whites together in the Kress store prior to August 14, 1964? A. Yes, we have.

Q. You served them on August 14, 1964, as well? A. Yes.

Q. And you served them since then; is that correct? [63]
A. Yes.

Q. Did you agree with any public official in Hattiesburg, of the state of Mississippi, to deny Miss Adickes or anyone in her group the use of the Hattiesburg public library facilities? A. No.

Q. Did you agree with anyone in Hattiesburg, any public official or State official, to have Miss Adickes arrested on August 14, 1964? A. No, I did not.

Q. Did you agree with any Hattiesburg official or State official to refuse service to Miss Adickes on August 14, 1964? A. No.

Q. Did you agree with anyone to deprive Miss Adickes any of her civil rights on August 14, 1964? A. No.

Q. After you received the threatening telephone calls which you told Mrs. Piel about, did you continue to serve negroes in the Kress store in Hattiesburg? A. Yes.

Q. In spite of those calls? A. Right.

Q. You told us you refused service to Miss Adickes because you believed that there was a possibility of a dangerous or riotous situation; is that correct? [64] A. Yes.

Q. Was there any other reason why you refused her service? A. No; that was the only reason.

MR. LITVACK: I have no further questions.

BY MRS. PIEL:

Q. Isn't it true, Mr. Powell, that you had a discussion with Miss Baggett before August 14th, and you had an agreement with her concerning who you might serve and who might not be served in the event that there was going to be some sort of a situation?

MR. LITVACK: I will object to that. He has already told you what the conversation was. I don't think there was any agreement in that conversation.

Q. You had no agreement with Miss Baggett?

MR. LITVACK: Was there an agreement between you and Miss Baggett as to who you would or would not serve?

THE WITNESS: No.

Q. Wasn't there an agreement, if she were to look at you, and you were giving her a signal, she would then instruct her employees what to do?

MR. LITVACK: I object to that. I object to your mischaracterizing it.

Q. Did she agree to do what you instructed her?

MR. LITVACK: Were you asking for her agreement in what [65] you were instructing her to do?

Q. She consented, did she not, to follow your instructions?

MR. LITVACK: I object to that. She is an employee, and she does what she is told here. She is an employee, and she does what she is told?

THE WITNESS: Yes.

Q. She consented to do what you said she should do in the event a situation would arise concerning negroes and white people who would ask for service? Is that correct?

MR. LITVACK: I object. He already told you what she said. She didn't say anything. She would do what she was told to do. She is an employee, and she did, in fact, what she was told to do, as he testified earlier.

MRS. PIEL: I don't need your testimony.

MR. LITVACK: I don't mean to be testifying. I object to the question. It has already been asked and answered. She is an employee, and she was doing what she was told to do.

Q. You had an agreement with Miss Baggett, if a certain situation would arise, she would do certain things; is that correct?

MR. LITVACK: I object. It has been asked and answered already.

[66] MRS. PIEL: Are you going to instruct the witness not to answer?

MR. LITVACK: The question has been asked and answered, yes. It is clear in the record what took place in

that conversation, and, if anything was agreed to. It is all in the record, that nothing was agreed to. Everything is in the record. I am instructing him not to answer.

MRS. PIEL: I have no further questions.

MR. KATZ: I have one or two.

BY MR. KATZ:

Q. When you had your conversation, your first conversation with Miss Baggett, in which you either told her, or instructed her, or ordered her, in a situation where you had a mixed racial mixed group coming in for service, she would look to you as to whether to serve any member of that group—

MR. LITVACK: I am going to object to that question. That is not quite what he said, Mr. Katz, again.

MR. KATZ: Then you tell me what he said.

MR. LITVACK: It is in the record.

MR. KATZ: Let's read the record back. Let's go back to the beginning of the examination.

MR. LITVACK: I can tell you off the record.

MR. KATZ: I want the record read.

(Whereupon the prior portion of the record was read by the reporter.)

MR. KATZ: I withdraw the question.

BY MR. KATZ:

Q. You heard your testimony just read, Mr. Powell, with respect to your conversation with Miss Baggett; is that correct? A. Yes.

Q. Do you feel that the instructions that you gave to Miss Baggett were in compliance with the company's policy as set forth in Plaintiff's Exhibit 1, the letter dated July 15, 1964?

MR. LITVACK: I object, and I instruct the witness not to answer.

MR. KATZ: On what ground?

MR. LITVACK: Total lack of relevancy, whether he feels it is or isn't. I don't see what bearing this has on the case.

MR. KATZ: We will get a ruling on it.

BY MR. KATZ:

Q. Is it not a fact, Mr. Powell, that you were directed by company policy to serve all persons, regardless of their race, and regardless of who they were accompanied by?

MR. LITVACK: That policy speaks for itself.

MR. KATZ: I am asking this witness.

[68] Q. Do you know that this was the company policy, to serve all persons regardless of race?

MR. LITVACK: Just read it, Mr. Katz. It is not long. You will see we had a company policy.

MR. KATZ: I can read it, Mr. Litvack. I am asking Mr. Powell if this was the policy as he understood it.

MR. LITVACK: That we will not refuse to serve anyone because of race, color or creed. That is what the policy is.

Q. Do you understand what the policy of Kress is?

A. Yes.

Q. They were to serve all persons. A. Yes.

Q. Is there any exception made in that policy letter with respect to whites in the company of negroes?

MR. LITVACK: They were not to refuse service to anyone because of race, color or creed. He said that is his understanding of the policy.

MR. KATZ: I am asking him a totally different question. Please read back the question.

(Whereupon the pending question was read by the reporter.)

MR. LITVACK: I object to the question. The policy [69] says that he shall not refuse service to anyone because of race, color or creed. That is the policy. What do you want to ask him about that policy?

MR. KATZ: Read the question back again, please.

(Whereupon the pending question was read by the reporter.)

MR. LITVACK: The policy does not say they were to serve all persons under all circumstances. They were not to refuse service to anyone because of race, color or creed. But it does not say they were to serve all persons under all circumstances.

MR. KATZ: That is your testimony.

MR. LITVACK: I made a statement in conjunction with him.

MR. KATZ: That is not an objection to my question. It is a statement.

MR. LITVACK: I am objecting to the question.

Q. By what authority, Mr. Powell did you take it upon yourself to instruct Miss Baggett under certain situations not to serve a racially mixed group, or some persons in the racially mixed group, when you felt there was a threat of violence?

MR. LITVACK: I object to the form of the question, I instruct the witness not to answer the question.

[70] Q. Did anyone instruct you, Mr. Powell, did any superior instruct you, to give the order that you gave Miss Baggett concerning service to a racially mixed group? A. No, they did not.

Q. You felt you had the authority and power to give such instructions to Miss Baggett, did you not?

MR. LITVACK: I object to the form of the question. I object to the question.

Q. Did you have the power?

MR. LITVACK: He did it.

MR. KATZ: I know he did it. I am asking, did he have the power and authority to do it.

MR. LITVACK: He did it, so obviously he has the power.

MR. KATZ: Quite obviously he did it.

MR. LITVACK: Would you do something unless you had the authority?

THE WITNESS: No.

Q. Did you have the authority?

MR. LITVACK: You are asking him whether he thought he did?

Q. Did you have the authority to give such an order to Miss Baggett?

MR. LITVACK: I am going to object. It calls for a [71] conclusion on his part, which he is incapable of making. He did it. That is the fact.

MR. KATZ: I am not asking if he did it.

Q. Did you have the authority to do it?

MR. LITVACK: I object, and I instruct the witness not to answer. I don't see where we are going to get anywhere.

Q. Did you advise any superior of yours as to the instructions you gave Miss Baggett? **A.** No, I did not.

Q. Do you know if anyone was aware of any such instructions you gave Miss Baggett? **A.** No.

MR. KATZ: I have no further questions.

MR. LITVACK: This examination is concluded, as far as I am concerned, subject to our earlier agreement between counsel concerning any future orders of the Court relating to unanswered questions.

oOo

Subscribed and sworn to before
me this day of
1965.

[Caption omitted in printing]

NOTICE OF CROSS MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Eleanor Jackson Piel, sworn to on the 17th day of January, 1966, and upon the pleadings and all the proceedings herein, the undersigned will cross move this Court at a Motion Term thereof, to be held in Room 506 of the United States Courthouse, Foley Square, Borough of Manhattan on the 25th day of January, 1965, at 10 a.m. of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 15 of the Federal Rules of Civil Procedure

granting leave to the plaintiff to amend its complaint herein to add a cause of action under Sections 1 and 2 of the Civil Rights Act of 1875 (Act of March 1, 1875, ch. 114, Stat. 335) and that leave be granted to the plaintiff to serve and file said amended complaint, and for such other and further relief as to the Court shall seem meet and proper in the premises.

DONNER & PIEL
Attorneys for Plaintiff

By: /s/ Eleanor Jackson Piel
A Member of the Firm
Office and P. O. Address
36 West 44th Street
New York, N.Y. 10036

TO:

**DONOVAN, LEISURE, NEWTON
& IRVINE**
Two Wall Street
New York, N. Y. 10005
Attorneys for Defendant

[Caption omitted in printing]

JURY DEMANDED
AMENDED COMPLAINT FOR DAMAGES
(PROPOSED)

The plaintiff, Sandra Adickes, by her attorneys, Donner & Piel, alleges that:

I.

Jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution and Title 42

United States Code Section 1983, and under Sections 1 and 2 of the Civil Rights Act of 1875 (Act of March 1, 1875, ch. 114 Stat. 335).

II.

The matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs.

III.

During all times herein mentioned, plaintiff was and is a citizen of the United States and a resident of the City and State of New York.

IV.

During all times herein mentioned, defendant was and is a corporation duly incorporated under the laws of the State of New York and defendant maintains a store, the purpose of which is to serve the public, in which is located a public lunch counter and booths for eating in the City of Hattiesburg, State of Mississippi.

V.

At all times mentioned herein, plaintiff was a volunteer actively engaged in a movement in the State of Mississippi known as the Mississippi Project, sponsored by the Council of Federated Organizations, a Mississippi voluntary association. Said Council was and is composed of several organizations the purpose of which is to integrate Negro citizens into the political and economic life of Mississippi, to improve the educational opportunities and secure state and federal franchise for such citizens.

VI.

Plaintiff who was and is a White Caucasian high school teacher employed by the New York City Board of Education, volunteered to spend the summer of 1964 in Mississippi. From July 6, 1964, to August 14, 1964, the date of the incidents hereinafter described, plaintiff was a volunteer teacher

at a Freedom School located at the Priest Creek Baptist Church in Palmer's Crossing in Hattiesburg, Mississippi.

VII.

On August 14, 1964, at or about twelve o'clock noon, plaintiff accompanied by six Negro students, entered the Hattiesburg Public Library in the City of Hattiesburg, State of Mississippi, a Facility maintained by the taxpayers of the City of Hattiesburg for the use of the public. The Negro students requested the use of the facilities of the library. They were refused the use of such facilities and were thereupon requested to leave by the librarian employed by the Board of Trustees of such public library. Upon the said students' refusal so to do, the librarian called the Chief of Police and he declared the library closed.

VIII.

Thereafter, plaintiff and the Negro students, upon the said Chief of Police' request, left the library and entered the premises of defendant's store in Hattiesburg and sat down at a public booth for the purpose of ordering lunch. A waitress employed by defendant and acting in the course of such employment took the orders of the Negro students refused to take the order of plaintiff or to serve said plaintiff because plaintiff was a Caucasian in the company of Negroes.

IX.

Plaintiff was thereby deprived of the privilege of equal enjoyment of a place of public accommodation by reason of her association with Negroes and was thereby discriminated against because of race in violation of the Constitution of the United States and of Title 42 United States Code, Section 1983.

X.

Defendant's action toward plaintiff as aforesaid in denying plaintiff service was under color of state law, custom and usage in conformity with Mississippi Code Sections

2046.5(1956); 2056(7) (1954); 4065.3(1956) and Senate Concurrent Resolution 125 (1956), copies of which laws and Resolution are attached, marked Exhibit "A" and incorporated by reference herein. Such action of defendant as aforesaid represented a following of the custom of the community to segregate the races in public eating places and was effected to conform with such custom and usage as expressed by statute and legislative resolution as aforesaid.

XI.

By reason of defendant's conduct in refusing service to plaintiff wilfully and maliciously, knowing plaintiff was entitled to same, plaintiff was damaged in the sum of \$50,000.

AS A SECOND AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

XII.

Plaintiff realleges the allegations set forth in Paragraphs I. through X. as though set forth again at this point.

XIII.

As the result of defendant's conduct as aforesaid and under Sections 1 and 2 of the Civil Rights Act of 1875, defendant has violated said law by denying to plaintiff the full enjoyment of equal accommodations in defendant's establishment by reason of her association with Negroes and defendant is liable to plaintiff for the sum of \$500 as statutory penalty.

AS A THIRD AND SEPARATE CAUSE OF ACTION, PLAINTIFF ALLEGES:

XIV.

Plaintiff realleges the allegations set forth in Paragraphs I. through X. as though set forth again at this point.

XV.

While plaintiff was seated in said booth at defendant's store as aforesaid, an Officer of the Law, acting under instructions of the Chief of Police, entered defendant's said store and observed plaintiff in the company of the Negro students.

XVI.

Upon defendant's refusal to serve plaintiff, plaintiff and the Negro students left defendant's store and went out upon the sidewalk whereupon plaintiff was arrested by the Officer of the Law who had previously entered defendant's store. Plaintiff was taken into custody and charged with the offense of vagrancy. Plaintiff was taken to the City Jail and was held in custody to be released only upon \$100 bail.

XVII.

Upon information and belief, plaintiff alleges that defendant and the Chief of Police of the City of Hattiesburg and his agents conspired together to deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation because she accompanied Negro students to the public library and sought to eat in the company of Negroes in a public place.

XVIII.

By reason of said conspiracy as aforesaid, defendant through its agents acting jointly with the police officials of the City of Hattiesburg, caused the arrest of plaintiff on the false charge of vagrancy.

XIX.

At the time of plaintiff's said arrest for vagrancy, she was regularly employed in New York City at an annual salary of \$7,200 per year, and she had in her possession in her purse the sum of twenty dollars and eight cents. Plaintiff further had in her possession thirty dollars in Travelers checks and a check book showing a balance of forty-five dollars or more at the First National Bank of Hattiesburg. Plaintiff so ad-

vised the arresting officer of such facts, who then knew that plaintiff was not a vagrant who unlawfully, wilfully and knowingly so became by habitually loafing and loitering in idleness on the streets and avenues and in the public places of said City of Hattiesburg the greater portion of her time without regular employment or any visible means of support.

XX.

By reason of said conspiracy as aforesaid, plaintiff was photographed, fingerprinted and booked as a common criminal in the Hattiesburg police station and was held in custody in a jail cell until released on one hundred dollars bail.

XXI.

By reason of said conspiracy as aforesaid, plaintiff was and is required to go to court to attempt to secure the dismissal of said charges of vagrancy, to travel back and forth to Mississippi from her home in New York and to secure counsel to aid her to her special damage in an amount now unknown to her.

XXII.

Said conspiracy as described aforesaid was in conformity with the policy of the law and the custom of the State of Mississippi as more particularly described in Paragraph X. above.

XXIII.

By reason of said conspiracy as aforesaid, wherein defendant and the duly constituted authorities of the State of Mississippi jointly, wilfully and maliciously sought to deprive plaintiff of her right to aid Negro citizens in their attempt to enjoy the benefits of integrated library facilities, in her desire to be served in a place of public accommodation, and her right to be free from arbitrary and capricious arrest, plaintiff has been damaged in the sum of \$500,000.

WHEREFORE, plaintiff prays:

1. For damages in the sum of \$50,000 for defendant's wilful failure to serve her as above described.
2. For special damages in a sum now unknown as described in Paragraph XVIII. above.
3. For damages in the sum of \$500 pursuant to Paragraph XIII. above.
4. For damages in the sum of \$500,000 for defendant's wilful conspiracy with police officials of the City of Hattiesburg to deprive her of her civil rights under the laws and Constitution of the United States.
5. For costs of suit and for such other relief as seem meet and proper to the court in the premises.

DONNER & PIEL
Attorneys for Plaintiff

By: /s/ Eleanor Jackson Piel
A Member of the Firm
Office and P.O. Address
36 West 44th Street
New York, N. Y. 10036

Exhibit "A"

GENERAL LAWS OF MISSISSIPPI - 1956

Chapter 466 - SENATE CONCURRENT RESOLUTION NO. 125

A CONCURRENT RESOLUTION condemning and protesting the usurpation and encroachment on the reserved powers of the states by the Supreme Court of the United States and declaring that its decisions of May 17, 1954, and May 31, 1955, and all similar decisions are in violation of the Constitutions of the United States and the State of Mississippi, and are therefore unconstitutional and of no lawful effect within the territorial limits of the State of Mississippi; declaring that a contest of powers has arisen between the State of Mississippi and said Supreme Court and invoking the historic doctrine of interposition to protect the sovereignty of this and the other states of the Union; and calling on our sister states and the Congress for redress of grievances as provided by law; and for other purposes.

Be it Resolved by the Senate of the State of Mississippi, the House of Representatives concurring therein, That the Legislature of Mississippi unequivocally expresses a firm determination to maintain and defend the Constitution of the United States, and the Constitution of this State, against every attempt, whether foreign or domestic, to undermine and destroy the fundamental principles embodied in our basic law by which this government was established, and by which the liberty of the people and the sovereignty of the States, in their proper spheres, have been long protected and guaranteed;

That the Legislature of Mississippi explicitly and peremptorily declares and maintains that the powers of the Federal Government emanate solely from the compact, to which the States are principals, as limited by the plain sense and long recognized intention of the instrument creating that compact;

That the Legislature of Mississippi firmly asserts that the powers of the Federal Government are limited; and valid only to the extent that these powers have been conferred as enumerated in the compact to which the various states assented originally and to which the states have consented in subsequent amendments validly ratified;

That the inherent nature of this basic compact apparent upon its face, is that the ratifying states, parties thereto, have agreed voluntarily to confer certain of their sovereign rights, but only specific sovereign rights, to a Federal Government thus constituted; and that all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, have been reserved to the states respectively, or to the people;

That the State of Mississippi has at no time, through the Fourteenth Amendment to the Constitution of the United States, or in any manner whatsoever, delegated to the Federal Government its right to educate and nurture its youth and its power and right of control over its schools, colleges, educational and other public institutions and facilities, and to prescribe the rules, regulations and conditions under which they shall be conducted;

That the aggrandizement of powers by the Federal Government has grown far beyond that ever conceived by the authors of our Constitution, that the seizure and concentration therein of powers not granted by the compact under which the several states entered this Union, and particularly that by which Mississippi entered the Union on December 10, 1817, threaten to reduce these sovereign states to mere satellites, and to subject us to the tyranny of centralized government, so rightfully abhorred by the founders, and for the prevention of which they exercised their finest genius;

That in late years the encroachment upon the reserved rights of the States and of the people has grown apace, and the proponents of the acts of encroachment have grown so emboldened that not one of the sister states and its people have escaped the oppressive hand thereof. In the destruc-

tion of their vested property rights; abridgments of their liberties; control of their institutions, habits, manners and morals by centralized bureaucratic instrumentalities; and in fact by various wrongful and obtrusive acts, too numerous to be here documented, but so consistently characterized by an oppressive course of action so as to seriously threaten to completely destroy our constitutional processes and substitute in lieu thereof ideologies foreign to the soil of our beloved land;

That one of the noblest characteristics of our people is the reverent respect for an obedience to the courts of law and justice, and that which more than any other has ennobled our institutions of government, and ought to be challenged only with the most dreadful reluctance, still it should be solemnly and firmly declared that the hand of tyranny ought to be stayed from whatsoever source it might strike;

That we profess an undying attachment to and a warm regard and respect for the sister states, and for this Union, which, through unwarranted and unconstitutional action of the Supreme Court, is fastly being dissolved by usurpation of powers reserved to the states and transferring them to an all-powerful centralized government which, unless halted, will reduce the state to impotent vassals, sheared of all rights and powers except those received at the sufferance of the Federal Government;

That a question of contested power has arisen; the Supreme Court of the United States asserts, for its part, that the states did in fact prohibit unto themselves the power to maintain racially separate public institutions, and the State of Mississippi, for its part, asserts that it and its sister states have never delegated such rights;

That the flagrant assertion upon the part of the Supreme Court of the United States, accompanied by threats of coercion and compulsion against the sovereign states of this Union, constitutes a deliberate, palpable, and dangerous attempt by the court to usurp the exercise of powers not granted to it;

That the Legislature of Mississippi asserts that whenever the Federal Government attempts to engage in the deliberate, palpable and dangerous exercise of powers not granted to it, the states who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties appertaining to them;

(That failure on the part of this state thus to assert its clear rights would be construed as acquiescence in the surrender thereof, and that such submissive acquiescence to the seizure of one right would in the end lead to the surrender of all rights, and inevitably to the consolidation of the states into one sovereignty, contrary to the sacred compact by which this Union of States was created;

That the question of contested power asserted in this resolution is not within the province of the court to determine because the court itself seeks to usurp the powers which have been reserved to the states, and, therefore, under these circumstances, the judgment of all of the parties to the compact must be sought to resolve the question; that the Supreme Court is not a part to this compact, but a creature of the compact, and the question of contested power cannot be settled by the creature seeking to usurp the power, but by the parties to the compact who are the people of the respective states in whom ultimate sovereignty finally reposes.

BE IT FURTHER RESOLVED THAT:

In order that relief be obtained and the wrongs and injuries inflicted be alleviated, we invite all of our sister states to join in taking such steps as are necessary to settle the grave question of contested sovereignty herein raised; the State of Mississippi declares that the Congress has the duty and authority to protect the rights of the states from the unwarranted encroachment upon their reserved powers to govern the internal and domestic affairs of the states; the State of Mississippi further asserts that the Congress has, on many

occasions in the past, curbed the attempted encroachment by the judiciary upon the legislative and executive branches of government, and it is the responsibility of the Congress likewise to protect the states when their constitutional rights and privileges are endangered;

The State of Mississippi declares emphatically that the sovereign states of the Nation have never surrendered their rights and powers to control their public schools, colleges and other public institutions; therefor, when an attempt is made to usurp these powers, the people of Mississippi object and refuse to be so deprived, reminding the Congress that the preservation of this union of States, as the compact intended it should be, depends upon the preservation of the sovereignty of the states;

The compact intended ours to be a government of the people, for the people and, above all, a government by the people; if the right to govern and control the local affairs to decide questions of public health, morals, education and safety are taken from the states, then a fatal blow has been dealt state sovereignty and the states are nothing more than vassal provinces; subject to a central government;

The State of Mississippi declares that it is the duty and privilege of a state to object to the aforesaid invasion of its rights and does hereby interpose its sovereignty to protect these rights; it is the duty of the Congress to halt such practices and save these rights; and if such cannot be obtained other than by amendment to the Federal Constitution, we appeal to the Congress, in the exercise of the power granted under Article 5 of the Constitution, to initiate and submit an appropriate amendment direct to the forty-eight states for ratification by three fourths (3/4) of the Legislatures thereof, declaring that the states have never surrendered their rights and powers to control public schools, colleges and other public institutions and facilities to the Federal Government, or any department or agency thereof, but such powers are reserved to the states; and until such time as these wrongs are righted, we do hereby declare the decisions

and order of the Supreme Court of the United States of May 17, 1954, and May 31, 1955, to be a usurpation of power reserved to the several states and do declare, as a matter of right, that said decisions are in violation of the Constitutions of the United States and the State of Mississippi and therefore, are considered unconstitutional, invalid and of no lawful effect within the confines of the State of Mississippi;

We declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to void this illegal encroachment upon our rights, and we do hereby urge our sister states to take prompt and deliberate action to check further encroachment by the Federal Government, through judicial legislation, upon the reserved powers of all states.

The Governor of Mississippi is respectfully requested to transmit a copy of this resolution to the President of the United States, the Governor of each of the other states, and to the members of Congress and the Supreme Court of the United States.

Adopted by the Senate, February 29, 1956.

Adopted by the House of Representatives, February 29, 1956.

MISSISSIPPI CODE, SECTION 2046.5 (1956)

**Business customers, patrons or clients
right to choose - penalty for violation**

1. Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theaters, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale,

is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; provided, however, the provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

2. Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that "the management reserves the right to refuse to sell to, wait upon or serve any person," however, the display of such sign shall not be a prerequisite to exercising the authority conferred by this act.

3. Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

4. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act.

MISSISSIPPI CODE, SECTION 2056(7) (1954) Conspiracy

If two (2) or more persons conspire

* * *

(7) To overthrow or violate the segregation laws of this state through force, violence, threats, intimidation, or otherwise;

* * *

such persons, and each of them, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than twenty-five dollars (\$25.00), or shall be imprisoned not less than one month or more than six (6) months, or both.

MISSISSIPPI CODE, SECTION 4065.3 (1956)

Compliance with the principles of segregation of the races

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Deci-

sions of the United States Supreme Court of May 17, 1954 (347 U.S. 483, 74 S. Ct. 686, 98 L. ed. 873) and of May 31, 1955 (349 U. S. 294, 75 S. Ct. 753, 99 L. ed. 1083), and to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof.

STATEMENT OF DOLORES FREEMAN

My name is Dolores Freeman. I was first employed by Kress on a Part time basis in their Hattiesburg store on July 14, 1964. On July 31, 1964, I began working on a full time basis. I quit my job to take other employment on November 6, 1964. During my employment with Kress I worked as a waitress in the food department.

On August 14, 1964, a group composed of several Negroes and a white woman came in and were seated at two of our lunch counter booths. I went over to their booths and took the Negroes' orders. They each ordered a hamburger and a coke. The white woman asked if I had forgotten her order. When I told her no she asked if I were refusing to serve her. I told her yes that I was acting under an instruction from my supervisor, Miss Baggett, the Food Department Manager. She then asked me for the name of the store manager, and I gave her Mr. Powell's name. After this the group got up and left the store without waiting for their orders.

I did not contact the police or ask anyone else to contact the police to make the arrest which subsequently occurred.

The above statement is correct to the best of my knowledge.

/s/ Dolores Freeman
November 19, 1964

pl. Ex. 9 id.
Exam. Powell
7/13/65

GJ

STATEMENT OF IRENE SULLIVAN

My name is Irene Sullivan. I am employed by the S. H. Kress Co. in their Hattiesburg, Mississippi store as a cashier.

On August 14, 1964, during the noon rush period, I was operating the south checkout at the front of the store. Shortly after 12:00 noon, I saw Patrolman Ralph Hillman of the Hattiesburg Police Department enter the southerly located front door. He came into the store past my check-out and went out of my line of vision into the back part of the store. After he came in I glanced out the front window and saw a police car parked across the street from our store. The car had one policeman inside.

A few minutes later Patrolman Hillman left our store by the northerly front door just slightly ahead of a group composed of several Negroes accompanied by a white woman. As Hillman stepped onto the sidewalk outside our store the police car pulled across the street and into an alley that is alongside our store. The police car stopped and Patrolman Hillman escorted the white woman away from the Negroes and into the police car.

I spoke to Hillman as he entered the store, a hello greeting. I did not mention the Negroes being in the store, in fact I did not realize they were there until I saw them leaving. I did not make any contact or statement that could have resulted in the subsequent arrest of the complainant. Further, to my knowledge and from my observations no other Kress employee approached Patrolman Hillman or made any statement to him that could have resulted in the subsequent arrest of the complainant.

The above statement is correct to the best of my knowledge.

/s/ Irene Sullivan
11/18/64

Pl. Ex. 3 id.
Exam. Powell
7/13/65,

GJ

[Caption omitted in printing]

BONSAL, D. J.

OPINION

Defendant, S. H. Kress & Company (Kress), moves for summary judgment pursuant to Rules 12 and 56, F. R. Civ. P. Plaintiff cross moves for an order granting leave to plaintiff to amend her complaint pursuant to Rule 15, F. R. Civ. P.

On November 12, 1964, plaintiff commenced this action to recover damages under Title 42 U.S.C. § 1983.* Her complaint alleges that defendant, acting both under color of state law (Count I) and in conspiracy with the Chief of Police of Hattiesburg, Mississippi, and his agents (Count II), denied plaintiff service at defendant's lunch counter in Hattiesburg because she sought to eat in the company of Negroes. Plaintiff also seeks an order for leave to amend her complaint to allege a third cause of action (Proposed Third Count) under Sections 1 and 2 of the Civil Rights Act of 1875 (Act of March 1, 1875, ch. 114, 18 Stat. 335).

For the purposes of defendant's motion for summary judgment, the allegations and inferences of fact set forth in the pleadings, affidavits and other materials before the court must be viewed in the light most favorable to the plaintiff, *United States v. Diebold, Inc.*, 369 U. S. 654 (1962); *Pol-ler v. Columbia Broadcasting*, 368 U.S. 464 (1962), and summary judgment may be granted only if there is "no genuine issue as to any material fact." Rule 56(c), F. R. Civ. P.

The undisputed facts for the purposes of this motion are as follows:

During the summer of 1964, the plaintiff, a white New York City school teacher, was a volunteer Freedom School teacher in Hattiesburg, Mississippi. On August 14, 1964, plaintiff and six Negro students sought to integrate the Hattiesburg Public Library, but were refused the use of its facil-

ties and shortly thereafter the library was closed by the Chief of Police of Hattiesburg. On leaving the library, plaintiff and the six students proceeded to a Woolworth store for the purposes of eating lunch and, on the way, plaintiff observed policemen following them. Since the Woolworth store was crowded, the plaintiff and her group went to defendant's store and sat down in two lunch booths and ordered lunch. The waitress took the orders of the six Negroes, but refused to take plaintiff's order. The six Negroes refused to eat unless plaintiff was served. They left the store and had proceeded only a short distance when a police officer, previously observed by plaintiff, arrested her for vagrancy.

Count I of Plaintiff's Complaint:

In Count I of her complaint, plaintiff alleges that defendant has denied her the "equal enjoyment of a place of public accommodation by reason of her association with Negroes." She grounds her cause of action on 42 U.S.C. § 1983, which provides that any person who "under color of" state law deprives another of "rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law"

Defendant argues that more private discrimination is not encompassed by § 1983. *Monroe v. Pape*, 365 U.S. 167 (1961); *Civil Rights Cases*, 109 U.S. 3 (1883). In addition defendant refers to recent cases holding that a restaurant owner who refuses service on racial grounds pursuant to common law permitting the owner to "select his patrons as he desires," but not compelling him "to segregate his customers" does not act under color of law. *Williams v. Howard Johnson's Inc., of Washington*, 323 F.2d 102, 105 (4th Cir. 1963); *Williams v. Lewis*, 342 F.2d 727 (4th Cir. 1965), cert. denied, 382 U.S. 814 (1965); *Williams v. Hot Shoppes, Inc.*, 293 F.2d 835 (D.C. Cir. 1961), cert. denied, 370 U.S. 925 (1962); *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959).

However, as pointed out in various law review articles, the concept of "state action" has been greatly expanded in re-

cent years. Lewis, "The Meaning of State Action," 60 *Colum. L. Rev.* 1083 (1960); Pollak, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," 108 *U. Pa. L. Rev.* 1 (1959); Van Alstyne and Karst, "State Action," 14 *Stan. L. Rev.* 3 (1961). To satisfy the requirement of "state action" in this case, the plaintiff points to Mississippi Code, § 2046.5 (1964), which provides:

"Business customers, patrons or clients—right to choose—penalty for violation.

1. Every person, firm or corporation engaged in any public business . . . in the State of Mississippi . . . [is] authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve

* * *

3. Any person who enters a public place of business in this state . . . and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and . . . refuses so to do, shall be guilty of a trespass"

Therefore, the Mississippi Code, unlike the common law rulings interpreted in the *Williams* cases, does more than authorize a restaurant owner to choose its customers. It provides a criminal sanction against anyone who is requested to leave, but refuses to do so.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held that implementation of private discrimination by the state's use of its legal powers constitutes a violation of the equal protection clause. In interpreting the scope of the 14th Amendment, the Civil Rights Act of 1964 states that:

"(d) Discrimination or segregation by an establishment is supported by State action . . . if such discrimination or segregation . . . (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof"
42 U.S.C. 2000a(d).

Therefore, if plaintiff can show that defendant discriminated against her pursuant to a custom enforced by the State under Mississippi Code, § 2046.5, of refusing service to whites in the company of Negroes, she will satisfy the state action requirement of 42 U.S.C. § 1983.

Defendant asserts that it refused to serve plaintiff only out of fear that a riot would otherwise have occurred. Plaintiff denies, however, that an "explosive situation" existed and states that when she asked why her order was not taken, defendant's waitress replied, "We have to serve Negroes, but we are not serving whites who come in with them." There is no evidence as to whether defendant's store manager had knowledge of Mississippi Code, § 2046.5 or was influenced by it in ordering the waitress not to serve plaintiff. Under these circumstances, the court cannot say that there is no genuine issue as to any material fact. For these reasons, defendant's motion for summary judgment as to Count I of plaintiff's complaint is denied and plaintiff will be permitted to amend Count I of her complaint to allege state action pursuant to Mississippi Code, § 2046.5.

Count II of Plaintiff's Complaint:

In Count II of her complaint, plaintiff alleges that defendant conspired with the Hattiesburg police department to deprive her of constitutional rights, but after extensive pre-trial discovery, plaintiff has failed to allege any facts from which a conspiracy might be inferred. As stated by Judge Weinfeld in *Morgan v. Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1954), *aff'd*, 220 F.2d 758 (2d Cir. 1955), *cert. denied*, 350 U.S. 867 (1955):

"Fully recognizing that conspiracies are rarely proved by direct evidence, nonetheless some evidence, however slight, must be offered of a fact from which a reasonably-minded person can draw an inference of the alleged conspiracy."

The court finds no evidence in the complaint or in the affidavits and other papers from which a "reasonably-minded

person" might draw an inference of conspiracy. See also *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468 (S.D.N.Y. 1961).

Moreover, the defendant and the members of the Hattiesburg police force involved in the plaintiff's arrest have denied under oath that any conspiracy in fact existed. The plaintiff may not defeat defendant's motion for summary judgment on the mere hope that she will be able to discredit these denials by cross-examination at trial. *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952). For these reasons, defendant's motion for summary judgment as to Count II is granted.

Proposed Third Count:

By motion to amend her complaint, plaintiff seeks to add a third count under Sections 1 and 2 of the Civil Rights Act of 1875 (Act of March 1, 1875, ch. 114, 18 Stat. 335). Section 1 of that Act provides that, "all persons . . . shall be entitled to the full and equal enjoyment of the accommodations . . . and privileges of inns, public conveyances . . . , theatres, and other places of public amusement" Section 2 of the Act provides for a civil action by any person aggrieved under the law whereby such person may recover in damages the sum of \$500.00. Act of March 1, 1875, § 2, ch. 114, 18 Stat. 336.

Sections 1 and 2 of the Civil Rights Act of 1875 were declared unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883), but have never been repealed by Congress. In view of the Supreme Court's decisions in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), declaring constitutional the public accommodations section, Title II, of the Civil Rights Act of 1964 (42 U.S.C. § 2000a, *et seq.*), there is authority for judicial revival of the 1875 sections. Nimmer, "A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875," 65 *Col. L. Rev.* 1394 (1965).

However, not even the broadest interpretation of "inns" as used in the 1875 Act could encompass the defendant's lunch counter. See, Nimmer, "Judicial Validation," *supra*, at pp. 1396-1397 and cases cited. For this reason, it is unnecessary to decide whether Sections 1 and 2 have been or can be revived, and plaintiff's motion to amend her complaint to add a cause of action thereunder is denied.

The parties will settle an order in accordance with the foregoing.

Settle order on notice.

Dated: New York, N. Y.

February 26, 1966.

/s/ Dudley B. Bonsal
U.S.D.J.

[Caption omitted in printing]

ORDER

Defendant, S. H. KRESS & COMPANY, having moved this Court for an Order granting summary judgment in defendant's favor pursuant to Rule 56, Federal Rules of Civil Procedure, with respect to Counts I and II of the complaint herein and plaintiff having cross moved for an Order seeking to amend the complaint pursuant to Rule 15, Federal Rules of Civil Procedure, and said motions having come on for hearing before the Court on January 25, 1966;

NOW, upon reading and consideration of the affidavits in support of an in opposition to the motions, the depositions heretofore had, the answers to interrogatories previously filed, the Statement of Material Undisputed Facts filed pursuant to Rule 9(g) of the Rules of this Court, the memoranda of law filed by both parties and the entire record in

this case and after hearing argument by counsel for both parties, and the Court after due deliberation having filed its opinion, dated February 26, 1966, it is

ORDERED that plaintiff's cross motion for leave to amend the complaint is granted to the extent that plaintiff will be permitted to amend Count I thereof to allege state action pursuant to Mississippi Code, § 2046.5, said amended complaint to be served and filed within twenty (20) days from the date of entry of this Order; plaintiff's cross motion is in all other respects denied; and it is

FURTHER ORDERED that defendant's motion for summary judgment with respect to Count I of the complaint is denied, and with respect to Count II of the complaint is granted.

Dated: New York, New York
March 14, 1966

/s/ Dudley B. Bonsal,
U.S.D.J.

[Caption omitted in printing]

**JURY DEMANDED
SECOND AMENDED COMPLAINT
FOR DAMAGES**

The plaintiff, Sandra Adickes, by her attorneys, Donner & Piel, alleges that:

I.

Jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution and Title 42 United States Code Section 1983.

II.

The matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs.

III.

During all times herein mentioned, plaintiff was and is a citizen of the United States and a resident of the City and State of New York.

IV.

During all times herein mentioned, defendant was and is a corporation duly incorporated under the laws of the State of New York and defendant maintains a store, the purpose of which is to serve the public, in which is located a public lunch counter and booths for eating in the City of Hattiesburg, State of Mississippi.

V.

At all times mentioned herein, plaintiff was a volunteer actively engaged in a movement in the State of Mississippi known as the Mississippi Project, sponsored by the Council of Federated Organizations, a Mississippi voluntary association. Said Council was and is composed of several organizations the purpose of which is to integrate Negro citizens into the political and economic life of Mississippi, to improve the educational opportunities and secure state and federal franchise for such citizens.

VI.

Plaintiff who was and is a White Caucasian high school teacher employed by the New York City Board of Education, volunteered to spend the summer of 1964 in Mississippi. From July 6, 1964 to August 14, 1964, the date of the incidents hereinafter described, plaintiff was a volunteer teacher at a Freedom School located at the Priest Creek Baptist Church in Palmer's Crossing in Hattiesburg, Mississippi.

VII.

On August 14, 1964, at or about twelve o'clock noon, plaintiff accompanied by six Negro Students, entered the Hattiesburg Public Library in the City of Hattiesburg, State of Mississippi, a Facility maintained by the taxpayers of the City of Hattiesburg for the use of the public. The Negro students requested the use of the facilities of the library. They were refused the use of such facilities and were thereupon requested to leave by the librarian employed by the Board of Trustees of such public library. Upon the said students' refusal so to do, the librarian called the Chief of Police and he declared the library closed.

VIII.

Thereafter, plaintiff and the Negro students, upon the said Chief of Police' request, left the library and entered the premises of defendant's store in Hattiesburg and sat down at a public booth for the purpose of ordering lunch. A waitress employed by defendant and acting in the course of such employment took the orders of the Negro students but refused to take the order of plaintiff or to serve said plaintiff because plaintiff was a Caucasian in the company of Negroes.

IX.

Plaintiff was thereby deprived of the privilege of equal enjoyment of a place of public accommodation by reason of her association with Negroes and was thereby discriminated against because of race in violation of the Constitution of the United States and of Title 42 United States Code, Section 1983.

X.

Defendant's action toward plaintiff as aforesaid in denying plaintiff service was under color of state law, custom and usage and was, in addition, pursuant to Mississippi Code Section 2046.5 (1956) a copy of which law is attached, marked Exhibit "A" and incorporated by reference herein.

Such action of defendant is aforesaid represented a following of the custom of the community to segregate the races in public eating places and was effected to conform with such custom and usage.

XI.

By reason of defendant's conduct in refusing service to plaintiff wilfully and maliciously, knowing plaintiff was entitled to same, plaintiff was damaged in the sum of \$50,000.

WHEREFORE, plaintiff prays:

1. For damages in the sum of \$50,000 for defendant's wilful failure to serve her as above described.
2. For costs of suit and for such other relief as seem meet and proper to the court in the premises.

[Subscription omitted in printing]

[Exhibit A, Mississippi Code, Section 2046.5 (1956), attached to Second Amended Complaint for Damages is duplicate of Exhibit A attached to Amended Complaint for Damages and appears at pp. 173-174.]

ANSWER OF S. H. KRESS AND COMPANY TO SECOND AMENDED COMPLAINT

Defendant S. H. Kress and Company ("Kress") as and for its answer to the second amended complaint in the above-entitled action:

1. *As to Paragraph I: Denies* the allegations contained therein.
2. *As to Paragraph II: Denies* the allegations contained therein.

3. *As to Paragraph III: Admits* the allegations contained therein.

4. *As to Paragraph IV: Admits* the allegations contained therein.

5. *As to Paragraph V: Denies* sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained therein.

6. *As to Paragraph VI: Denies* sufficient knowledge or information upon which to form a belief as to whether plaintiff is presently employed by the New York City Board of Education. *Admits* the remaining allegations contained therein.

7. *As to Paragraph VII: Admits* the allegations contained therein.

8. *As to Paragraph VIII: Admits* that plaintiff and the Negro students left the library and some time thereafter entered the premises of defendant's store in Hattiesburg and sat down at a booth. A waitress employed by defendant took the orders of the Negro students but declined to take the order of plaintiff. Defendant *denies* that the waitress refused to take the order of plaintiff because she was a Caucasian in the company of Negroes and *denies* each and every remaining allegation except as expressly admitted herein.

9. *As to Paragraph IX: Denies* the allegations contained therein.

10. *As to Paragraph X: Denies* the allegations contained therein.

11. *As to Paragraph XI: Denies* the allegations contained therein.

AS AND FOR AN AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

PRAYER

WHEREFORE, the defendant Kress prays:

1. That plaintiff's requested relief be denied.
2. That judgment be entered dismissing the complaint herein with costs.
3. That defendant have such other and further relief as may be just and proper.

Dated: May 12, 1966.

[Subscription omitted in printing]

[Caption omitted in printing]

PRE-TRIAL ORDER

On July 20, 1966, the parties to this action or their attorneys appeared before the Court at a pre-trial conference pursuant to local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken.

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this pre-trial order.
2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings as amended except that the following issues raised by the amended pleadings are expressly abandoned: No such issue is expressly abandoned.
3. (a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

(1) The plaintiff is a resident of New York as is the defendant, by reason of its incorporation under the laws of the State of New York.

(2) The defendant privately owns and operates and did, on August 14, 1964, a variety store containing eating facilities which serve the public in the City of Hattiesburg, Mississippi.

(3) During the summer of 1964, plaintiff, a caucasian New York City school teacher, was a volunteer teacher in Hattiesburg, Mississippi at a Freedom School located at the Priest Creek Baptist Church in Palmers Crossing, Hattiesburg, Mississippi.

(4) Kress issued a policy statement, on or about July 15, 1964, expressly prohibiting the refusal of service in its stores to anyone because of race, color or national origin.

(5) The Kress Hattiesburg store maintained one set of eating facilities for its patrons since at least July 3, 1964. Prior to August 14, 1964, Kress had served Negroes at its luncheon counter in the Hattiesburg store.

(6) On August 14, 1964, plaintiff and six Negro students went to the Hattiesburg public library. The students were refused the use of the library, which was thereafter closed by the Chief of Police.

(7) Subsequently that day plaintiff and the six Negro students entered the Kress Hattiesburg store.

(8) The store contained 100 or more people, and people both inside and outside the store observed plaintiff and her group.

(9) Plaintiff and her group sat in two booths and sought to be served.

(10) The waitress took the orders of the Negroes but refused to take the order of the plaintiff.

(11) The waitress, in refusing plaintiff service, was acting under express instruction from the store manager, Mr. Gordon T. Powell.

(12) When plaintiff was refused service, the whole group of students and plaintiff got up and left the defendant's store.

(13) A portion of the food served at the lunch counter has moved in interstate commerce.

(b) It is the plaintiff's contention that: Defendant's lunch counter holds itself out to serve the public and serves food, a substantial portion of which has moved in commerce. Plaintiff contends that there was a strong custom and usage against the mixing of Caucasians and Negroes in public places in Mississippi in the summer of 1964. That custom was of long standing and the passage of the Civil Rights Bill effective July 1, 1964, did not change this custom. Plaintiff further contends that it was this custom and usage which prompted defendant's manager and defendant's agent, the waitress, to refuse plaintiff service when she requested it on August 14, 1964. That the custom is strongly rooted in the law of the State of Mississippi is shown by various laws which had been approved by the legislature and were on the books at the time of the incident. Copies of these laws and legislative declarations, Mississippi Code Section 2046.5 (1956); 2056(7); 2065.3 (1956) and Senate Concurrent Resolution 125 (1956) are attached to Plaintiff's First Amended Complaint, marked "Exhibit A" and are incorporated by reference in this pre-trial order.

Plaintiff further relies on the express language of the Civil Rights Act of 1964 which states:

"(d) Discrimination or segregation by an establishment is supported by state action . . . if such discrimination or segregation . . . (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof . . ." [42 U.S.C.A. 2000a(d)]

and in so doing contends that the action of the manager in authorizing the refusal of service to plaintiff was state action within the meaning of 42 U.S.C.A. 1983 as interpreted by 42 U.S.C.A. a(d).

(c) It is defendant's contention that: Based upon the undisputed facts, Kress is not liable to plaintiff under 42 U.S.C.A. § 1983 in light of the applicable law. Kress contends that the refusal to serve plaintiff was made by the local store manager based solely upon his considered belief that lives and property were threatened by a dangerous situation. Kress contends that the decision not to serve plaintiff was not predicated upon her color or anyone else's but rather on the threat of violence; Mr. Powell's decision was in no way related to any act or statute of the State of Mississippi.

Defendant contends that in order to recover damages plaintiff must show that there is a positive provision of state law requiring segregation of eating facilities and that defendant acted pursuant to such a provision. A provision of state law which merely reiterates the common law right of a restaurant to choose its customers is not sufficient state action to satisfy Section 1983, *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959); *Williams v. Howard Johnson's Inc.*, 323 F.2d 102 (4th Cir. 1963); *Williams v. Lewis*, 342 F.2d 727 (4th Cir. en banc), cert. denied, 382 U.S. 814 (1965); *Harrison v. Murphy*, 205 F. Supp. 449 (D. Del. 1962).

The mere customs of the people of the state do not constitute state action within the prohibition of the Fourteenth Amendment, *Williams v. Howard Johnson's Restaurant, supra*; *Williams v. Hot Shoppes, Inc.*, 293 F.2d 835 (D.C. Cir. 1961), cert. denied, 370 U.S. 925 (1962). Plaintiff, to recover here, must prove at the outset that, on August 14, 1964, there was in the State of Mississippi a custom whereby a white person in the company of Negroes would be refused service. *Adickes v. Kress*, 252 F. Supp. 140 (S.D.N.Y. 1966). To prove this custom plaintiff must show that this was an established practice; custom and usage cannot be shown by evidence of particular instances unless they are sufficiently numerous to show an established practice, *Schillie v. Atchison, T. & S. F. Ry. Co.*, 222 F.2d 810 (8th Cir. 1955); *Bagby v. Boston*, 131 F.2d 887 (5th Cir. 1942). The prac-

tice must be well settled in the community, generally known, uniform in observance, and certain and fixed in character; *In re Bowling Green Milling Co.*, 132 F.2d 279 (7th Cir. 1942); *Porter v. Rabinowitz*, 159 F.2d 512 (5th Cir. 1947); *Poling v. Baltimore & Ohio R. R. Co.*, 166 F. Supp. 710 (N.D. W. Va. 1958).

Even if plaintiff were able to prove such a custom, she must prove that this custom was enforced by the State of Mississippi through Mississippi Code § 2046.5, that defendant's store manager knew of the existence of the statute, and that he acted under such statute when refusing to serve plaintiff, *Adickes v. Kress*, *supra*.

Plaintiff's repeated attempts, as in plaintiff's contentions herein, to rely on Mississippi Code Sections 2056(7) (1954) and 2075.3 (1956), as well as Senate Concurrent Resolution No. 125 (1956) are specious. This was rejected by Judge Bonsal when defendant moved for summary judgment in this case. When plaintiff subsequently attempted to again inject this material by inserting it in the amended complaint, the Court ordered the complaint dismissed and the material stricken. Thus, this matter has been decided adversely to plaintiff and plaintiff is estopped from relitigating this dead issue.

Defendant finally contends that even if it is assumed *arguendo* that it violated Section 1983, plaintiff has sustained no damage as a result thereof.

4. (a) The exhibits which each party now expects to offer at the trial are those identified in the memorandum heretofore filed pursuant to local Calendar Rule 13(b) III (g). Should any party hereafter decide to offer additional exhibits, *prompt* notice of that fact shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the exhibit was not theretofore identified. No exhibit may be offered at trial unless identified in a pre-trial memorandum.

(b) Not applicable.

(c) The parties agree that the following documents which were marked for identification or which are otherwise identified in the order are authentic and may be received in evidence (each party reserves the right to object to the materiality or relevancy of each document preceded by the letter "A" and each party reserves the right to object to all or a portion of each document preceded by the letter "B" on the ground that it is inadmissible under the hearsay rule):

"B" 1. Letter, Louis P. Johnson, to all store managers, dated July 15, 1964.

"B" 2. Photograph, Time Magazine, July 17, 1964, page 25.

"B" 3. Photograph, Kress Hattiesburg store.

5. The parties agree that the witnesses whom each party now intends to call, along with the speciality of experts to be called, are those listed in the memorandum heretofore filed pursuant to local Calendar Rule 13(b) III (h). Should any party hereafter decide to call any additional witnesses, *prompt* notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum.

6. Each party agrees to call no more than two (2) expert witnesses, in accordance with the provisions of paragraph 5 hereof.

7. The following are all the claims for damages or for other relief asserted by the plaintiff in this action as of the date of this conference:

General Damages	\$1,000.00
Punitive Damages	\$500,000.00

8. The parties also agreed on the following matters:

(a) Plaintiff at this time expects to require 3 trial days;
defendant at this time expects to require 3 trial days.

9. The issues to be tried are formulated by the Court (with the consent and agreement of the parties) as follows:

(1) On August 14, 1964, in Hattiesburg, Mississippi, was there a custom of refusing service to whites who were in the company of Negroes?

(2) Did defendant discriminate against plaintiff in refusing her service at its lunch counter pursuant to a custom enforced by the state under Mississippi Code § 2046.5 of refusing service to whites in the company of Negroes?

(3) Did defendant discriminate against plaintiff in refusing service to her at its lunch counter in violation of 42 U.S.C. § 1983?

(4) Is plaintiff entitled to recover monetary damages under the 14th Amendment to the Constitution?

(5) Did the Kress store manager have any knowledge of Mississippi Code § 2046.5 on August 14, 1964?

(6) If defendant discriminated against plaintiff in contravention of law, what damage, if any, did plaintiff suffer?

(7) Is plaintiff entitled to receive punitive damages and, if so, in what amount?

Dated: New York, New York
August 12, 1966

SO ORDERED:

W/s/ Sylvester S. Ryan
U.S.D.J.

CONSENTED TO:

/s/ Eleanor Jackson Piel
Attorneys for Plaintiff

/s/ Donovan, Leisure, Newton & Irvine
Attorneys for Defendant

[Caption omitted in printing]

JUDGMENT

The issues in the above entitled action having been brought on regularly for trial before the Honorable Charles H. Tenney, United States District Judge and a jury on February 14 and 15, 1967, and the defendant at the conclusion of plaintiff's case having moved for a directed verdict in its favor, and the Court having granted the said defendant's motion, it is,

ORDERED, ADJUDGED and DECREED: That the defendant S. H. KRESS AND COMPANY have judgment against the plaintiff SANDRA ADICKES dismissing the complaint herein.

Dated: New York, N.-Y.
February 15th 1967

/s/ John J. Olear, Jr.
Clerk

[Caption omitted in printing]

At a Slated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the day of in the year of our Lord, One Thousand Nine Hundred and Fifty.

PRESENT: Honorable Charles H. Tenney
United States District Judge

Now comes the Plaintiff By Donner & Piel by Eleanor Jackson Piel and moves the trial of this cause. Likewise comes the Defendant by Donavan, Leisure & Newton by Sanford Litvack and Alfred H. Hoddinott, Jr.

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial Feb 14 1967 Feb 15 1967 Pltff rests. *Deft moves pursuant to Rule 50(a) F.R.C.P. for a directed verdict in favor of deft. Motion granted. Court directs verdicts for deft.*

Jos. Clodt

Excerpts From Plaintiff's Pre-Trial Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Calendar No. 147(2)

Docket No. 64 Civ. 3426

SANDRA ADICKES,

Plaintiff,

v.

S. H. KRESS & COMPANY,

Defendant.

PLAINTIFF'S WITNESSES

Plaintiff intends to be a witness in her own behalf and intends to produce the following additional witnesses:

Curtis Duckworth
Gwendolyn Merritt
Carolyn Moncure
Dianne Moncure
Lavonne Reed
Jimmella Stokes

Plaintiff reserves the right to call additional witnesses upon due notice to defendant.

Dated

June 28, 1966

Respectfully submitted

DONNER & PIEL

Attorneys for Plaintiff

Sandra Adickes

36 West 44th Street

New York, New York 10036

[Caption omitted in printing]

AN EXTRACT OF THE MINUTES

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 76 September Term, 1967.
(Argued October 16, 1967 Decided December 27, 1968.)
Docket No. 31262

SANDRA ADICKES,

Plaintiff-Appellant,

- against -

S. H. KRESS AND COMPANY,

Defendant-Appellee.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeal by plaintiff-appellant from the order and judgment entered in the United States District Court for the Southern District of New York, Charles H. Tenney, *Judge*, directing a verdict in favor of defendant-appellee, S. H. Kress & Co., at the close of appellant's case in her action for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff-appellant also appeals from the order entered by Dudley B. Bonsal, *Judge*, granting appellee summary judgment with respect to a conspiracy alleged in the original complaint.

Affirmed.

ELEANOR JACKSON PIEL, New York, N. Y., *for appellant.*

SANFORD M. LITVACK, New York, N. Y. (Donovan Leisure Newton & Irvine, New York, N. Y., of counsel, James R. Withrow, Jr., Alfred H. Hoddinott, Jr., New York, N. Y., on the brief), *for appellee.*

MOORE, *Circuit Judge:*

The facts of this case are not in dispute. Plaintiff-appellant is a school teacher and resident of New York. In the summer of 1964, she volunteered to teach Negro students in a Mississippi Freedom School. On August 14, 1964, plaintiff, accompanied by six Negro students, entered the Hattiesburg, Mississippi, public library and requested the use of the library facilities. This request was refused, and they were told to leave. When they refused, the police were summoned, and the library was closed by the Chief of Police.

After their eviction from the library, plaintiff and the students proceeded to the Woolworth store in Hattiesburg for the purpose of eating lunch. Since the Woolworth store was crowded, they went instead to the Kress store, sat in booths near the lunch counter and sought to be served. Plaintiff, a Caucasian, admitted that one of the reasons the group chose Kress was that it served Negroes, and Kress claims to be a leader in the recognition of civil rights in the South. However, the waitress at the Hattiesburg store, acting under the orders of the store manager, took the orders of the Negroes but refused to serve plaintiff because she was in their company. According to the plaintiff, the waitress stated, "We have to serve the col-

ered, but we are not going to serve the whites that come in with them." After she was refused service, plaintiff and the students left the store. Plaintiff's movements were under surveillance by the Hattiesburg police from the time that she and the students left the library, and as the group left the Kress store she was arrested and jailed by the police on a vagrancy charge.

Plaintiff brought this action for damages against Kress in the United States District Court for the Southern District of New York, alleging that she was discriminated against because of her race in violation of the equal protection clause of the Fourteenth Amendment and in violation of the Civil Rights Act of 1871, 42 U. S. C. §1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

As a second cause of action, plaintiff alleged that there was a conspiracy between Kress and the Hattiesburg police to refuse to serve her and to arrest her as she left the store. However, except for the facts given above, plaintiff presented no relevant facts tending to support this conspiracy claim. She asked damages of \$50,000 on the first claim and \$500,000 on the conspiracy count.

Kress moved for summary judgment, pursuant to Fed. R. Civ. P. 56, with respect to both claims in the complaint.

On February 26, 1966, Judge Bonsal denied the motion with respect to the first cause of action, granted defendants summary judgment on the conspiracy claim, and permitted plaintiff to amend the complaint. 252 F. Supp. 140 (SDNY 1966). Plaintiff appeals from these orders. After an amended complaint was filed, a pre-trial order specifying the issues to be tried and the witnesses to be called was stipulated to by the plaintiff and entered by Chief Judge Ryan on August 2, 1966. Trial commenced before Judge Tenney and a jury on February 14, 1967, and at the close of plaintiff's case, a verdict was directed for defendant. Plaintiff appeals from the judgment entered on this verdict.

I.

Kress' motion for a directed verdict at the end of plaintiff's case was granted for failure to make out a prima facie case of discrimination in violation of the Fourteenth Amendment¹ and Section 1983. In determining the triable issues, both Judge Tenney and (then) Chief Judge Ryan followed the opinion handed down by Judge Bonsal which held that for plaintiff to succeed on the merits she had to show some "state action" or state involvement in the alleged discrimination because purely private discrimination is not prohibited by §1983 or the Fourteenth Amend-

¹ Sections 1 and 5 of the Fourteenth Amendment read as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

ment. Specifically, Judge Bonsal held that plaintiff must prove at the outset that:

(1) a custom existed on August 14, 1964, in the State of Mississippi and in Hattiesburg of refusing service in restaurants to whites in the company of Negroes, and

(2) this custom was enforced by the State of Mississippi pursuant to Mississippi Code Section 2046.5,² a criminal trespass statute. Judge Bonsal also intimated that plaintiff

2 *"Mississippi Code, Section 2046.5 (1956).*

"Business customers, patrons or clients—right to choose—penalty for violation.

"1. Every person, firm or corporation engaged in public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; provided, however, the provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

"2. Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that 'the management reserves the right to refuse to sell to, wait upon or serve any person,' however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this act.

"3. Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

"4. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act."

would have to establish that the store manager knew of, and acted pursuant to, §2046.5 in refusing plaintiff service. Judge Tenney did not reach this latter point as he ruled that plaintiff had failed to prove that such a custom existed or that it was enforced under §2046.5.

At the trial plaintiff testified that in her opinion it was the custom and usage in Hattiesburg not to serve white persons in the company of Negroes. However, plaintiff had never been in the State of Mississippi prior to June 1964 and had never visited Hattiesburg until July of that year. She did not have any personal knowledge of facts that would tend to show that such a custom existed. And each of the three students called by plaintiff as witnesses testified that they knew of no instances in which a white person had been refused service in Hattiesburg, Mississippi, while in the company of Negroes who were offered service. This failure of proof is not strange in light of the fact that Negroes only recently had been served in such establishments on an integrated basis.

II.

One day before trial, plaintiff notified defendant that she intended to have two expert witnesses testify on the relevant customs and usages in Mississippi and Hattiesburg. The District Court sustained Kress' objection to these witnesses testifying on the ground that plaintiff had totally failed to abide by the pre-trial order requiring "prompt" notice to opposing counsel if any additional expert witnesses were to be called. The exclusion of these witnesses was within the trial court's discretion. *Thompson v. Calmar S.S. Corp.*, 331 F. 2d 657, 662 (3rd Cir.), *cert. denied*, 379 U. S. 913 (1964); *Clark v. Pennsylvania RR.*, 328 F. 2d 591, 594-95 (2d Cir. 1964).

The proof presented by plaintiff was clearly insufficient to prove "custom, or usage, of any State" within the meaning of §1983. The statute requires that the discriminatory custom or usage be proved to exist in the locale where the discrimination took place, and in the State generally. Plaintiff's proof on both points was deficient. It is true that in 1956 the Mississippi legislature passed, in addition to the trespass statute referred to above, Mississippi State Senate Concurrent Resolution No. 125 condemning and protesting the Supreme Court's school integration cases (*Brown v. Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955)), and a resolution, found in Miss. Code §4065.3, directing the entire executive branch of government and all persons responsible thereto, including the police, to give effect to the Senate Concurrent Resolution, described as the "Resolution of Interposition." See also Miss. Code §2056(7), a broad conspiracy statute passed in 1954 which, *inter alia*, makes it a crime to conspire to overthrow or violate the segregation laws of the State. However, these 1956 enactments are clearly insufficient by themselves to prove that in 1964 Mississippi had a custom of separating the races in restaurants. *Williams v. Howard Johnson's Inc.*, 323 F. 2d 102, 106 (4th Cir. 1963); Comment, 50 Cornell L. Q. 473, 494 (1965). The trespass statute, Miss. Code §2046.5, is the only enactment not dealing with school integration and it, by itself, sheds no light on Mississippi customs and usages. Since plaintiff failed to prove custom or usage, we do not have to decide whether she also had to prove that the custom or usage was enforced by a state statute. See *United States v. Guest*, 383 U. S. 745, 761, 774 (1966) (concurring opinions of a majority of the Court indicating that such a showing of "state action" may not be necessary).

IV.

Plaintiff also contends on appeal that, assuming she has failed to prove the existence of a discriminatory state custom, she has nevertheless shown that she was discriminated against in violation of §1983 because the refusal to serve her was "under color" of the state trespass statute, Miss. Code §2046.5. The "under color" of law provision in §1983 has been construed to mean the same as "state action" under the Fourteenth Amendment. *United States v. Price*, 383 U. S. 787, 794 n. 7 (1966). The state action concept has been expanding over the years, but some state involvement in the racial discrimination has always been required. See *Reitman v. Mulkey*, 387 U. S. 369 (1967); *United States v. Guest*, 383 U. S. 745 (1966); *Lombard v. State of Louisiana*, 373 U. S. 267 (1963); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961); *Shelley v. Kramer*, 334 U. S. 1 (1948); see generally Silard, A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee, 66 Colum. L. Rev. 855 (1966); Comment, 50 Cornell L. Q. 473 (1965); Henkin, *Shelley v. Kramer*: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962); Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3 (1961); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960). No state involvement in the discrimination having been shown, plaintiff failed to prove a violation of §1983.

V.

This brings us to plaintiff's argument that the requisite state action may be found solely from the state encouragement of discrimination inherent in Miss. Code §2046.5. This argument is based on the recent case of *Reitman v. Mulkey*, 387 U. S. 369 (1967), which upheld the California Supreme

Court's decision that Art. 1, §26 of the California Constitution was unconstitutional under the Fourteenth Amendment. The Mulkeys had sued Reitman alleging that he had refused to rent to them an apartment solely on account of their race, in violation of California open housing legislation, Cal. Civ. Code §§51, 52, passed in 1959. Defendant moved for, and was granted summary judgment on the ground that §§51, 52 had been rendered null and void by the recent amendment to the California Constitution. Section 26, initiated as Proposition 13, provided that the state shall not "deny, limit or abridge . . . the right of any person . . . to decline to sell, lease or rent" his property "to such person or persons as he, in his absolute discretion, chooses." This amendment was added pursuant to an initiative and referendum vote in 1964, and was intended to repeal anti-discrimination housing legislation passed in 1959, 1961 and 1963.

The Mulkeys appealed to the California Supreme Court which reversed the grant of summary judgment on the ground that §26 violated the equal protection clause of the Fourteenth Amendment. The Supreme Court of the United States affirmed, agreeing with the California court that "the prohibited state involvement could be found 'even where the state can be charged with only encouraging,' rather than commanding discrimination." 387 U. S. at 375. According to the Court, the California court was justified in concluding that §26 did not merely repeal certain statutes, restoring the status quo ante, but "was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State." 387 U. S. at 381.

While plaintiff is not seeking to have the enforcement of Miss. Code §20-16.5 declared unconstitutional, she points

out that the main issue before the Court in *Reitman* was whether §26 involved the state in the otherwise private discrimination and that the Supreme Court held that it did. We must, therefore, decide whether the State of Mississippi by passage of §2046.5 "encouraged" the discrimination practiced by Kress. We are of the opinion that it did not.

In *Reitman* the California court was faced with a much publicized constitutional amendment which repealed prior anti-discrimination legislation and set up the right to discriminate as a policy of the state. The Supreme Court specifically noted that "the right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of state government. Those practicing racial discrimination need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from all censure or interference of any kind from official sources." 387 U. S. at 377. In the instant case, Mississippi has passed a statute which, as to restaurateurs at least, merely restated the common law rule allowing them to serve whom-ever they wished. See *R. v. Rymer*, 2 Q. B. 136, 40 L. J. M. C. 108 (1877); 21 Halsbury, Laws of England §941 at 447 (3rd ed. 1957). See also *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959). The common law is presumed to apply in Mississippi. See *Western Union Telegraph Co. v. Goodman*, 166 Miss. 782, 146 So. 128 (1933). Furthermore, in *Reitman*, the Supreme Court did not, and the California court did not, "rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations." 387 U. S. at 376. At least as applied to this case, we think the state must do more than it has done for the required state action to be found.

Although the denial of service to plaintiff probably constituted a violation of the Civil Rights Act of 1964, there is no provision for a damage remedy in that statute. Nor can the violation of that Act form the basis of a claim under §1983 since the injunctive remedy in that Act is the exclusive avenue of redress. 42 U. S. C. §2000a-5(b); *United States v. Johnson*, 269 F. Supp. 706 (N. D. Ga. 1967), prob. juris. noted, 36 L. W. 3172 (Oct. 23, 1967). Plaintiff's reliance on that Act is therefore misplaced. /

VII.

Plaintiff also contends that it was improper for Judge Bonsal to grant summary judgment on the conspiracy cause of action. Plaintiff's claim was wholly conclusory; she alleged no facts that would tend to suggest a conspiracy; and the chances of her proving such a conspiracy at the trial were nil. The grant of summary judgment was therefore proper. *Birnbaum v. Trussell*, 347 F. 2d 86 (2d Cir. 1965); *Powel v. Workmen's Comp. Board*, 327 F. 2d 131, 137 (2d Cir. 1964).

Affirmed.

WATERMAN, Circuit Judge (dissenting):

I dissent and would remand for further proceedings below. See *Achtenberg, Adickes et al. v. State of Mississippi*, 393 F. 2d 468 (5 Cir. 1968).

Miss Adickes was engaged in "protected activity"; Section 2046.5 of the Mississippi Code encouraged the defendant's employees to make the invidious discrimination; and her arrest upon her immediate exit from the store on the

un-sportable trumped up charge of vagrancy was a flagrant abuse of the State's criminal process in order to perpetuate by subterfuge Mississippi's well-known practice of preventing Caucasians and Afro Americans from grouping themselves together in company in places of public resort.

I reserve the right to file an enlarged opinion at a later date.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

March 26, 1969

WATERMAN, *Circuit Judge* (dissenting):

I respectfully dissent.

I.

I would reverse the judgment below and remand for further proceedings in the district court. I agree with my brothers' discussion in Part II of their majority opinion and with the result they reached there. I also agree with the result reached by them in Parts VI and VII. I must dissent, however, from the remainder of the majority opinion and from the order affirming the judgment for the defendant that was entered after the jury returned the defendant's verdict which the trial court had ordered.

In my view, the initial rulings on defendant's motion for summary judgment were erroneous, 252 F. Supp. 140. As a direct consequence of these erroneous rulings to which Chief Judge Ryan and Judge Tenney adhered, Chief Judge Ryan at the pretrial conference he held, and Judge Tenney at trial, deprived plaintiff of any opportunity effectively to present or to prove her case. Inasmuch as my brothers now approve the initial rulings and those made subsequent thereto, bottomed thereon, I believe it essential for me to file a rather exhaustive opinion, setting forth my position.

Plaintiff's claim for damages against Kress was based upon an alleged violation by Kress of the Civil Rights Act of 1871, 42 U. S. C. §1983. In support of her claim, plaintiff contended that Kress discriminated against her "under the color" of either "custom" or "statute, ordinance, [or]

regulation," i.e. "law" of the State of Mississippi, or both. These two grounds for recovery are separate and distinguishable from each other; they require different kinds of proof and they deserve individual attention and treatment. In Part II of this opinion I propose to examine the proof required to make a *prima facie* case "under the color of custom" allegation, and in Part III, I will explore the proof necessary to make one "under the color of law" allegation. The relevant discussions will examine the errors of the lower court judges and how these errors hindered the development of plaintiff's case.

II.

Although the Civil Rights Act of 1871 was the subject of extensive and intensive Congressional debate (see, *The Reconstruction Amendments' Debates*, 484-570 (1967)),¹ the exact dimensions of the term "custom" appear to have received scant attention. See, *id.*; see also, *id.* at 161-171, 174-183, 186-191, 198-209, 210, 584, 586, 609. Considering the passions aroused by the Reconstruction Amendments and the Civil Rights Bills and having in mind the close scrutiny Congress gave each Amendment and bill, it seems strange that more was not said in Congress about the meaning and scope of the term "custom." Of course, the logical reason for this must be that "custom" had a reasonably well fixed and definite meaning at the time the Civil Rights Act of 1871 was debated and enacted. The

¹ *The Reconstruction Amendments' Debates* is a 1967 publication of the Virginia Commission on Constitutional Government (now defunct). The edition is comprised of edited reprints and relevant legislative history of the important contemporary Senate and House debates discussing the 13th, 14th, and 15th Amendments and the related Reconstruction bills and acts of Congress.

definition in Black's Law Dictionary 461 (4th Ed. 1951) defining "custom" is

A usage or practice of the people which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. *Adams v. Insurance Co.*, 95 Pa. 355, 40 Am. Rep. 662 (1880); *King v. Shelton*, Tex. Civ. App., 252 S. W. 194, 195; *Conahan v. Fisher*, 233 Mass. 234, 124 N. E. 13, 15; *Lawrence v. Portland Ry., Light & Power Co.*, 91 Or. 559, 179 P. 485, 486; *U. S. Shipping Board Emergency Fleet Corporation v. Levensaler*, 53 App. D. C. 322, 290 F. 297, 300.

This definition appears to be a definition that would have been acceptable to the legislators in 1871. See, *The Reconstruction Amendments' Debates*, 164-65, 176-77, 182-83, 198, 204-05, 210, 216, 492-93, 498, 519, 553-54, 584, 586 (1967); cf. *Civil Rights Cases*, 109 U. S. 3, 16-17 (1883); 17 *Corpus Juris Customs and Usages* §1-6 (1919); see also, Vol. 10A, *Words and Phrases*, Perm. Ed., p. 732 et seq. Cf. *Wilcox v. Wood*, 9 Wend. (N. Y.) 346, 349.

Accepting this definition as correct and compatible with Section 1983, it becomes immediately apparent that the practice Judge Bonsal ordered plaintiff to prove could not possibly qualify as a "custom" of the State of Mississippi or any part thereof. As the majority implicitly admits, a custom of not serving white persons who were in the company of Afro-Americans could not be proven because it was only after the Civil Rights Act of 1964 became law that Afro-Americans had an opportunity to be served in Mississippi "white" restaurants. See, e.g. *N. A. A. C. P. v. Thompson*, 357 F. 2d 831, 835 (5 Cir.), cert. denied sub

nom. *Johnson v. N. A. A. C. P.*, 385 U. S. 820 (1966); *Dilworth v. Riner*, 343 F. 2d 226 (5 Cir. 1965). Consequently the requirement that the practice intended to be proven as a "custom" be of "long and unvarying habit" could not be satisfied if, in fact, the relevant practice required to be proved by Section 1983 was that delineated by Judge Bonsal.

In making his ruling Judge Bonsal rejected plaintiff's assertion of the relevant Mississippi practice which had gained the status of a "custom" there. Plaintiff contended that the practice of fostering the segregation of races in places of public assembly was the relevant "custom." I agree. This long-standing practice which has been the subject of numerous writings, see, e.g., J. Silver, *Mississippi: The Closed Society* (1964); see, U. S. Senator Edward M. Kennedy, Book Review of "Coming of Age in Mississippi," by Anne Moody, The New York Times Book Review, January 5, 1969, at 5, col. 2, and the root of many legal controversies (see, e.g. *United States v. Price*, 383 U. S. 787 (1966); *City of Greenwood v. Peacock*, 384 U. S. 808 (1966); *Achtenberg v. Mississippi*, 393 F. 2d 468 (5 Cir. 1968); cf. *Sunflower County Colored Baptist Association v. Trustees of Indianola M. S. S. D.*, 369 F. 2d 795 (5 Cir. 1966)) is manifested in many ways. The refusal to serve the plaintiff is but one illustration.

Civil Rights laws, especially the Civil Rights Act of 1964, and the pressures exerted by local and national civil rights organizations have made it more difficult to refuse to serve Afro-Americans at what was formerly an all-white lunch area. However, by more subtle means, restaurant owners can and do let Afro-Americans and their white friends know that the ancient custom of racial segregation is not yet dead. This information was conveyed to the mixed

group here by the simple expedient of refusing to take the order of a white woman who would flaunt custom and in a dining establishment in the center of Hattiesburg sit down at the same table with and plan to break bread with young Afro-American friends.² The end result of these tactics and of other similar tactics was to cause by, for instance, the act here, the continued discriminatory separation in 1964 of the Afro-American diners from the white diners within the area of a so-called "integrated" eating establishment by prohibiting individual members of the races from dining together at the same tables or booths. Thus the custom, which has existed in the "closed society" of Mississippi since, admittedly, at least 1880, of not permitting the races to mix socially was reinforced and perpetuated.

Plaintiff's proffered evidence of the existence of a custom of separating the races in places of public assembly Mississippi State Senate Resolution No. 125 (1956); Miss. Code §4065.3 (1956); Miss. Code §2056.7 (1954) does not conclusively establish the fact that the custom of keeping the races separated existed in 1964. However, in the light of the cases which have involved one aspect or another of the custom, e.g., *City of Greenwood v. Peacock*, *supra*; *United States v. Richberg*, 398 F. 2d 523 (5 Cir.

2 The courts must be attuned to the subtle discriminations attempted by those intent on frustrating national policy; otherwise the rights guaranteed by the Constitution to all Americans will be hollow indeed. In examining possible discriminatory action the courts should remember:

One intent on violating [laws prohibiting discrimination] cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which "subtleties of conduct . . . play no small part."

Holland v. Edwards, 307 N. Y. 38, 45, 119 N. E. 2d 581, 584 (1954) (Fuld, J.).

1968); *N. A. A. C. P. v. Thompson, supra*; *Brown v. City of Meridian*, 356 F. 2d 602 (5 Cir. 1966); *Dilworth v. Riner, supra*; cf. e.g., *Sunflower County Colored Baptist Association v. Trustees of Indianola M. S. S. D., supra*; *Norton v. McShane*, 332 F. 2d 855 (5 Cir. 1964), *cert. denied*, 380 U. S. 981 (1965); *United States v. Faneca*, 332 F. 2d 872 (5 Cir. 1964), *cert. denied*, 380 U. S. 971 (1965), and the extensive writing concerning the general subject of segregation (see, e.g. *Silver, supra*; *E. Kennedy, supra*), the district court should have taken judicial notice of the *prima facie* fact that such a custom existed in Mississippi in 1964 and that the experience of the plaintiff was, *prima facie*, one illustration of the custom in action. See, e.g., *Meredith v. Fair*, 298 F. 2d 696, 701 (5 Cir. 1962); *United States v. Harpole*, 263 F. 2d 71 (5 Cir. 1959); *Bullock v. Tamiami Trail Tours, Inc.*, 266 F. 2d 326, 332 (5 Cir. 1959).

The error committed by Judge Bonsal in defining the relevant custom was compounded by his erroneous ruling that the relevant custom must be shown to exist both in the State of Mississippi and in Hattiesburg. Such proof is not required by Section 1983. Section 1983 only demands proof of a custom in the locality where plaintiff experienced the invidious racial discrimination. This proof could consist either of one or two types of evidence. First, plaintiff could produce evidence establishing the existence of a "general" custom which prevails throughout the State, see, e.g., *Bodfish v. Fox*, 23 Me. (10 Shep.) 90, 95; 39 Am. Dec. 611 (1843); see also *Black's Law Dictionary* 461 (4th Ed. 1951), and which, *a fortiori*, would be rebuttably presumed to exist as a custom in the locality where the discriminatory event occurred. Second, plaintiff could produce evidence that established the discriminatory practice to be a local custom prevailing only in the

particular locality where plaintiff experienced the discrimination. See, e.g. 1 *Blackstone*, Commentaries 74; *Black's Law Dictionary*, *supra*. Judge Bonsal's ruling to the extent that it required proof beyond that stated above was clearly erroneous and greatly hindered the presentation of plaintiff's case.

The lower court also erred in holding that the plaintiff, in order to satisfy the requirement of "state action," had to prove that the "custom" was enforced by means of Section 2046.5. By definition custom is a practice that has the force of law. *Black's Law Dictionary*, *supra*; see, e.g., *The Reconstruction Amendments' Debates*, *supra*, at 553-54; *Civil Rights Cases*, *supra*. When a practice has the force of law the practice, i.e., the custom, will be enforced by the imposition of some type of sanctions upon those who would violate the custom. However, since it is custom—unwritten law—with which we are dealing, the sanctions imposed for violation of the custom would not normally be spelled out as such in a written statutory code, or body of ordinances, or set of regulations. Enforcement of custom may be accomplished by a variety of methods "within the law." For instance, here the custom could be enforced through the use of Section 2046.5, if, presumably, the restaurant operator complained directly to the police, see, e.g. *Hamm v. City of Rock Hill*, 379 U. S. 306 (1964); *Peterson v. City of Greenville*, 373 U. S. 244 (1963); *Lombard v. Louisiana*, 373 U. S. 267 (1963). But it could also be enforced by other means as by arresting custom violators for breach of the peace, see, e.g., *Brown v. Louisiana*, 383 U. S. 131 (1966); *Wright v. Georgia*, 373 U. S. 284 (1963); *Taylor v. Louisiana*, 370 U. S. 154 (1962); *Garner v. Louisiana*, 368 U. S. 157 (1961); *Brown v. City of Meridian*, *supra*, or arresting violators on

charges of disorderly conduct, see, e.g., *Pierson v. Ray*, 352 F. 2d 213 (5 Cir. 1965) *reversed in part*, 386 U. S. 547 (1967); *Nesmith v. Alford*, 318 F. 2d 110 (5 Cir. 1963), or arresting; as here, on charges of vagrancy, see, e.g. *Achtenberg, Adickes, et al. v. Mississippi, supra*; *Robertson v. Johnston*, 376 F. 2d 43 (5 Cir. 1967), or by official harassment short of arrest, as, for instance, officer surveillance. The defendant hints of the possibility that those mixed racial groups who would dine together, as Miss Adickes and her Afro-American students, may not be the only persons who feel the force of sanctions imposed for the violation of custom. Restaurant operators such as Kress, could be harassed, threatened with license revocation or unnecessary but disruptive health inspections etc., if they violate custom by serving such mixed racial groups.³ Endless is the variety of ways by which public officials can ensure that custom has the force of a law. See *Lombard v. Louisiana, supra*. Of course, when custom is perpetuated and enforced only through the use of strictly private pressures⁴ with violators experiencing the icy chill of social ostracism administered by members of

3 The activities of the Mississippi State Sovereignty Commission, a curious arm of the state legislature, and of the White Citizens Council are of interest when one has the duty to probe the official or state involvement in the enforcement of the custom of segregating the races. It appears to be common knowledge that, in addition to its own activities promoting segregation, the Mississippi State Sovereignty Commission, an agency created in 1956 and financed by state tax revenues, used a part of its funds to finance some of the activities of various groups, including the White Citizens Council, which promote adherence to the ancient custom of proscribing the mixing of the races in places of public assembly; and that these groups, especially the White Citizens Council, use economic and social power to pressure those who might attempt to disregard custom into adhering to custom. See, generally, J. Silver, *Mississippi: The Closed Society*, 8, 32, 39-40, 42, 43, 65, 79, 94, 97, 110, 133, 151, 217 (1964).

4 Obviously any group would not be using state funds when so engaged. See note 3, *supra*.

a particular stratum of society, such a practice, although a way of life that exists within a State, would not be one that is classified as being a custom "of a State."

Nevertheless, one need not be confused between a social stratum's way of life and the custom of a State. To prove that a plaintiff is entitled to proceed in an action for redress under Section 1983, a plaintiff need but present a *prima facie* case that the State, or its instrumentalities, or its agencies, or its individual officers, directly or indirectly, lend either their authority, or the threat of power or the aura of prestige to the perpetuation and enforcement of the custom. See, e.g. *Reitman v. Mulkey*, 387 U. S. 369 (1967); *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 725 (1961); *Garner v. Louisiana*, *supra*, at 176-182 (Douglas, J., concurring) (1961); *Baldwin v. Morgan*, 287 F. 2d 750, 756-760 (5 Cir. 1961). See generally, Comment, *State Action Under the Equal Protection Clause of the Fourteenth Amendment and the Remaining Scope of Private Choice*, 50 Cornell L. Q. 472 (1965). And, a custom, if well known, is provable by the taking of judicial notice of it, as is also, if well known, the state-sponsorship thereof. If the plaintiff presents a *prima facie* case that there is the discriminatory custom and that proprietors of business establishments understand that the State seeks to preserve that custom, then the plaintiff has established plaintiff's initial burden of proof under Section 1983. So, if plaintiff establishes the existence of an understood state "custom" then it follows that, *prima facie*, the eating establishment operator, Kress, acted pursuant to that custom when it refused to serve Miss Adickes. See, *Lombard v. Louisiana*, *supra*; *Garner v. Louisiana*, *supra* at 181 (Douglas, J., concurring); *Bullock v. Tamiami Trail Tours, Inc.*, *supra*; cf. *Rolfe v. County Board*

of *Education of Lincoln County*, 391 F. 2d 77, 80 (6 Cir. 1968). If Kress acted pursuant to a state-sponsored or state-encouraged custom, it has subjected itself to possible liability to Miss Adickes under Section 1983. Consequently not only did plaintiff state a good cause of action under Section 1983 by alleging in Count I that Kress discriminated against her under the color of a custom but, in all likelihood, she would have been able to prove her cause of action at trial if she had not been restricted in her proof of its scope by erroneous pre-trial rulings of the lower court.

III.

Plaintiff also alleged in her complaint that Kress violated Section 1983 because its refusal to serve her was "under the color of law." This claim is correctly recognized by the majority as separate from the "under the color of custom" claim but the majority rejects it on the ground that plaintiff has failed to show any state involvement in the discrimination practiced by Kress. Since I believe that a *prima facie* case of "state action" was proved, I file my dissenting views.

According to the majority, the *Reitman v. Mulkey, supra*, analysis suggested by plaintiff is inapplicable because Mississippi in enacting Section 2046.5 of the Mississippi Code only restated the common law and "put in statutory form an existing policy of neutrality with respect to private discrimination."⁵ Premised upon this belief, the majority holds that "the state must do more than it has done for the required state action to be found" (Slip sheet, p. 3756). My ground for disagreement with the majority's conclusion that "state action" is lacking here is premised on what

⁵ *Reitman v. Mulkey*, 387 U. S. 369, 376 (1967) quoted in Part V of the majority opinion.

seems to me to be an incomplete analysis of the common law and of the nationally-known history of Mississippi's past policies with respect to "private discrimination."

Certainly common law rule, a rule presumed to apply in Mississippi, see *Western Telegraph Co. v. Goodman*, 166 Miss. 782, 146 So. 128 (1933), is not completely unequivocal in pronouncing that a restaurateur could serve whomever he wished. Blackstone stated:

... if an innkeeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action lies against him for damages if he, without good reason, refuses to admit a traveler. (Emphasis supplied.)

3 Blackstone *Commentaries* 164 (Lewis ed. 1902) at 166. See also *Letgivo—W. Moore v. Wood*, 294 N. Y. S. 2d 1009 (S. Ct. 1968); *Ferguson v. Gies*, 82 Mich. 358, 46 N. W. 718 (1890). In Tidswell, *The Innkeeper's Legal Guide* 22 (1964) a "victualling house" is defined as a place "where people are provided with food and liquors, but not with lodgings," and in 3 Stroud, *Judicial Dictionary* (1903) as "a house where persons are provided with victuals, but without lodging." In the shorter Oxford English Dictionary (1939), "victualler" is defined as "A purveyor of victuals or provisions; *spec.* the keeper of an eating-house, inn, or tavern; a licensed victualler." And see *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (1918). Therefore, a "restaurateur" is the equivalent of a "victualler" and, insofar as Blackstone's *Commentaries* may be the "common law" of the United States,

the Blackstone common law rule applicable to a victualler and a "victualling house" is applicable to a restaurateur and a place where food is served for consumption on the premises. It, if applicable, requires the restaurateur to serve all persons unless he can show "good reason" for denying service.

Most assuredly the common law allows the restaurateur to refuse to serve a person for good reason. "Good reason" of course means that the restaurateur may refuse to serve a person who is "... unclean, untidy, intoxicated, or affected by disease ..." (*Noble v. Higgins*, 95 Misc. 382, 158 N. Y. S. 867-68 (1961)); see also *Regina v. Rymer*, 2 Q. B. 136, 40 L. J. M. C. 108 (1877); but a refusal of service based upon racial discrimination is just as assuredly not a "good reason." *Id.*; see *Letaivo—W. Moore v. Wood*, *supra*. Therefore, to the extent that Mississippi Code Section 2046.5 allows a restaurateur a full discretion for any peculiar idiosyncrasy or prejudice of his own to pick and choose whom he wishes to serve, I submit that Mississippi has drastically changed the common law.

The majority's intimation that the passage of Section 2046.5 merely represented the placing into statutory form of an existing policy of neutrality toward private discrimination "defies history and common knowledge." *Meredith v. Fair*, 305 F. 2d 343, 360 (5 Cir. 1962). Until *Brown v. Board of Education*, 347 U. S. 483 (1954) and its progeny, Mississippi openly maintained a state policy of segregation and actively supported private racial discrimination. See, e.g., *Meredith v. Fair*, *supra*, and cases and materials cited in Part II of my dissent.

Since racial discrimination as a straightforward state policy has been denied by the Constitution, there has followed a subtle but deliberate delegation of the en-

forcement of the policy to private hands. The legislative "repeal" of the common-law duties of innkeepers is only one recent example of a time-tested practice elsewhere manifest in the history of voting rights. . . .

W. Van Alstyne and K. Karst, *State Action*, 14 Stan. L. Rev. 3, 4 (1961). Miss. Code Section 2046.5 is nothing more than another legal subterfuge designed to avoid and to frustrate the federal constitutionally required policy of equal treatment of the races and the right of equal access to and enjoyment of the facilities available in public places and enterprises holding themselves out as "engaged in public business."

Although my brothers may believe that Miss. Code Section 2046.5 appears on its face to take a neutral position with respect to private racial discrimination, it is clear that, like Proposition 14 in *Reitman v. Mulkey*, *supra*, Section 2046.5 is an affirmative action taken by the State which is intended to encourage, authorize, and to continue to make legally possible private racial discrimination by the proprietors of businesses there listed. Additionally (and this shows that Section 2046.5 is even more declaratory of the state's determination to racially discriminate than was demonstrable in Proposition 14), Section 2046.5 promises the discriminator the support of the police power of the State of Mississippi by authorizing the arrest for "trespass" of a person who refuses to leave a restaurant after being refused service irrespective of the reason for the refusal. Examination of the authorities, see, e.g., *Reitman v. Mulkey*, *supra*; *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961); *Shelly v. Kramer*, 344 U. S. 1 (1948); *McCabe v. Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151 (1914), leaves no doubt that the "state action" requirement is fulfilled in this case and that

the State of Mississippi, by enacting Section 2046.5 has significantly involved itself in private discriminations.

The only remaining question is whether the relationship which occurred here between the "state action" and the private discrimination is sufficiently close to conclude that the defendant, Kress, acted under the "color of law." Miss Adickes was subjected to "state action" immediately after the racial discrimination, and her immediate arrest was condemned by the Judges of the Fifth Circuit, the Federal Appellate Court most cognizant of Mississippi law and custom. I maintain that I, in this dissent, and the plaintiff in her pleadings and at trial, have the right to rely upon the judgment of that Court and that it is not for Judges of the Second Circuit to deny Miss Adickes her day in court when the Judges of the Fifth Circuit have so demonstrably spoken. See *Achtenberg, Adickes, et al. v. Mississippi*, *supra*; cf. *Bernhardt v. Polygraphic Company of America*, 350 U. S. 198 (1956) at 212 (Frankfurter, J., concurring). I repeat the statement I made earlier in this case:

I dissent and would remand for further proceedings below. See *Achtenberg, Adickes et al. v. State of Mississippi*, 393 F. 2d 468 (5 Cir. 1968).

Miss Adickes was engaged in "protected activity"; Section 2046.5 of the Mississippi Code encouraged the defendant's employees to make the invidious discrimination; and her arrest upon her immediate exit from the store on the unsupportable trumped-up charge of vagrancy was a flagrant misuse of the State's criminal process in order to perpetuate by subterfuge Mississippi's well-known practice of preventing Caucasians and Afro-Americans from grouping themselves together in company in places of public resort.

If plaintiff could show that Kress acted pursuant to the powers granted by Section 2046.5 to pick and choose whom it wished to serve then Kress was acting under the "color of law" and is liable under Section 1983. See, e.g., *United States v. Price*, *supra*; *Burton v. Wilmington Parking Authority*, *supra*; *Terry v. Adams*, 345 U. S. 461 (1953); *Evans v. Newton*, 382 U. S. 296 (1966); see also cases summarized in Black, Foreword, "State Action," *Equal Protection*, and California's Proposition 14, 81 *Harv. L. Rev.* 69, 86 (1967). In establishing that Kress acted pursuant to powers granted by Section 2046.5 plaintiff, in order to establish a prima facie case, need not prove that Kress actually knew of Section 2046.5 specifically or of its penalties; all that need be proven by direct or circumstantial evidence is that the employees of Kress had knowledge that under Mississippi law Kress did not have to serve Miss Adickes if she chose to be accompanied by her Negro friends. Cf. *Reitman v. Mulkey*, *supra*; *Peterson v. City of Greenville*, *supra*; *Robinson v. Florida*, 378 U. S. 153.

[Caption omitted in printing]

Before:

HON. CHARLES H. TENNEY, D. J.,
and a Jury.

New York, February 14, 1967
10:35 a.m.

APPEARANCES:

ELEANOR JACKSON PIEL, ESQ.,
Attorney for the Plaintiff

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.,
Attorneys for Defendant;

BY: SANFORD LITVACK, ESQ. and
ALFRED H. HODDINOTT, JR., ESQ., of counsel

* * *

[3] * * * MR. LITVACK: * * * May I raise with Your Honor one question which concerns us very deeply? Yesterday for the first time, that is the day before the trial was to commence, we were notified in the trial memorandum [4] which plaintiff submitted to us yesterday in passing of what appears to be the plaintiff's intention to call an additional witness, one Reverend Robert Beech.

THE COURT: I see another one listed here.

MR. LITVACK: At 12:15 of the same day I got a telephone call from Mrs. Piel giving me another name, one Andrew Gordon, and then another name, someone who is listed. This is a continuing thing. Under the calendar rules of this court, as your Honor knows, such a procedure is prohibited. We are to specify in the pre-trial order and in the trial memorandum who we intend to call. We are further required to give prompt notice to an adversary and to the Court if we intend to call any additional witnesses. This was not done. We were given notice yesterday. I might say, in passing, that Reverend Beech appears to be from Hattiesburg and I assume he is someone the plaintiff knew from 1964.

MRS. PIEL: I have never met him in my life.

MR. LITVACK: I have not heard any reason why this had to be done this day, why we could not get notice, why it was not specified in the first [5] instance and why not in the pre-trial memorandum. We are placed with two additional witnesses plus a third and that's a handicap.

MRS. PIEL: Your Honor, I regret the lateness of this. I had not considered who I might call in regard to an expert witness nor would I know until I knew who would be available. I felt that I must find someone who had been present in Hattiesburg during the summer of 1964 who could testify as to what the custom was. Now, I regret that I did not have such a person earlier available, however, I would never have known if I didn't know when the case was going to be tried who could come.

THE COURT: That's true with respect to your other witnesses?

MRS. PIEL: But I knew they were participants in the incident. I either had them or not. I deeply regret this.

THE COURT: It is extremely unfair to the defendant. How can they possibly cross-examine these people who are suddenly produced here at the eleventh or twelfth hour?

MRS. PIEL: Your Honor, they are produced [6] on the issue only of the custom.

THE COURT: That's the main issue in the case. I don't think there is any dispute here, that I can make out from the papers, that your client was refused service.

MR. LITVACK: There is no dispute about that.

THE COURT: There is no dispute about that. The main issue under Judge Bohsal's decision is, was there such a custom and usage; and assuming that there was, then we go on to the other issues to be proved. That's the keystone issue in this case.

MRS. PIEL: Your Honor, I am not happy that I have given these names so late but may I—

THE COURT: I am far from happy.

MRS. PIEL: May I ask you how the defendant is actually prejudiced with regard to their having the names now?

THE COURT: I can think of any number of reasons. I don't know who this reverend is and what his involvement is in any movements down there, or all sorts of things which would be relevant to his credibility on cross-examination.

MR. LITVACK: I don't know if he is a [7] long-time resident of Hattiesburg or just came down for the summer as part of this movement. I don't know anything. How can I start a cross-examination?

THE COURT: This man from Rockefeller University, there was no opportunity given to examine into his qualifications, to look into his background. There is no way that these people can in any way, it seems to me, adequately cross-examine him as to his qualifications to testify to custom and usage existing in 1964 down in Mississippi, in this particular area.

MRS. PIEL: I will await your Honor's ruling but if it is against the calling of Reverend Beech I will not bring him in. He is in Los Angeles at the present time.

THE COURT: I don't want to deprive you of your case here but—he is the clergyman and there was somebody else?

MR. LITVACK: Andrew Gordon whose name I heard yesterday.

MRS. PIEL: I was engaged from the moment I spoke to you and I admit not prior thereto, but from the moment I spoke to you in chambers about the possibility of our going on to trial today I started looking for appropriate persons.

[8] THE COURT: The thing is when Judge Bonsal handed down his decision which was over a year ago, the issues were framed.

MRS. PIEL: I had assumed that with regard to experts that I would await the moment when we saw the trial date coming.

THE COURT: Which you assumed in direct opposition to the pre-trial order which limits you to two expert witnesses and they are to be called in accordance with the provisions of paragraph 5 thereof.

MRS. PIEL: I did not set out to find them until I knew that we were going to trial. At that point it became a very

difficult task and I proceeded with as much dispatch as possible. I was spending my time trying to find these witnesses.

MR. LITVACK: What Mrs. Piel is saying is that this is an issue of preparation, that she didn't prepare and we should be penalized. You are supposed to do that. Now we are faced with the problem, if she is permitted to call these people, that we will be penalized by lack of preparation, by her lack of preparation. She won't be prejudiced. She has the plaintiff. She has now, I am told, three of the Negro students who were in the group who all, as I understand, [9] resided in Hattiesburg at the time and prior to that time, so I think between the four of them, to the extent they can make out any custom, she has plenty of witnesses.

MRS. PIEL: They are not experts. This has been a tremendous job. One witness has come in from Los Angeles. That witness came in last night. Another witness came from Dallas and another from New Orleans. These are the witnesses that were present at the incident. I want your Honor to know this has been a logistical problem which has not been—

THE COURT: We run into logistic problems in every case.

MRS. PIEL: I realize that. I am not unaware of that.

THE COURT: These people who come this long distance are not the experts?

MRS. PIEL: No, but this is not an excuse and I am only telling you what I have been doing—I moved with dispatch from the moment I heard we were going to trial. That's all I can say.

THE COURT: When did you first learn about this college man?

MR. LITVACK: Yesterday morning, at 9:45 [10] in the morning when we received the trial memo. It says in passing, this custom and usage will be proved by Reverend Beech who will testify to that. I never heard of him until that.

MRS. PIEL: Your Honor's office will report that I called at 5:00 o'clock Friday afternoon and that was when I—I was not able to find this person, I was not able to talk to

him. I didn't want to put his name down until I felt I could put anyone's name down.

THE COURT: You have not brought him a long distance?

MRS. PIEL: He is still there.

THE COURT: Then you would not have had to have brought him here and not call him?

MRS. PIEL: Correct. Andrew Gordon is here in New York.

THE COURT: Who is Mr. Gordon?

MRS. PIEL: I can't tell you a great deal about him. I only spoke to him for the first time when I was in Albany yesterday over the telephone. I was hoping to speak with him further. I know he was in Mississippi during the summer and he is attached now, I believe, in doing some sociological study in [11] the Rockefeller University.

THE COURT: So he becomes an expert in Mississippi?

MRS. PIEL: Within this area, yes. I will come in with more qualifications. I don't have them at the moment. I think the reverend is a better expert.

THE COURT: The reverend is not here.

MRS. PIEL: We will have him here if you will permit me.

MR. LITVACK: I think, your Honor, that it becomes clear to me—I don't know who Mr. Gordon is either and I guess Mrs. Piel doesn't know. Obviously someone does and presumably that's the plaintiff. He was there during the summer of 1964. He has been, I assume, in New York since that time or at least for some period of time. He has never been identified at a pre-trial proceeding, be they pre-trial depositions, interrogatories, Rule 34 motions or what-have-you. He is not identified in the pre-trial order or memorandum and at 12:15 the day before the trial you get a long distance call from Albany about a man who suddenly appears on the scene. He has been here all along.

[12] MRS. PIEL: The plaintiff does not know him, as far as I know. I did not find him through the plaintiff. This is not information that I had in my petition at any time.

THE COURT: How is the defendant going to conduct the necessary investigation into this college man's qualifications, associations, activities, which would probably form a subject of cross-examination? It seems to me on the crucial issue in the case that this is really a clear abuse of discretion on the part of the Court. I don't see how it could stand up. We would be wasting our time. I don't like to see your case hobbled, so to speak, by this, but I do have to consider both sides. Honestly, this is a little different when you are in some sort of a case where you have expert witnesses who are expert witnesses every day of the week and coming in on cases and usually known to counsel at any rate, and if one party suddenly comes up a day or so in advance and says "I am going to call Captain So-and-so as my marine expert" or so-and-so in some other field, the lawyers are not put in the position because they already in most cases have dealt with this particular expert or they have their [13] own expert.

MRS. PIEL: Is there anything I could do in terms of cooperating with the Court or counsel which would facilitate anything?

THE COURT: I don't know. Maybe these gentlemen have a suggestion. I don't know.

MR. LITVACK: I am sorry, I don't. It would seem a little unusual to me and I don't know how she could go about aiding me in my cross-examination and give me the facts I ought to know and could discover for myself if I had the time.

THE COURT: I have cases assigned from now on. It is not a question of putting the case over so that defense counsel has adequate time to go into the qualifications of these experts.

MR. LITVACK: Plus, as your Honor knows, we do have a logistics problem. We went to the expense of bringing people in, too. They are here.

THE COURT: Yes. I can't construe the pre-trial order to define promptly advising your adversary of your expert witness as twenty-four hours before the trial, or, in this case, half an hour as to one witness.

MRS. PIEL: No, no. I served it yesterday [14] afternoon and called them at noon. I am not disputing or arguing about what the facts were in this regard. The difficulty is, if you put the matter over for this purpose, on the date the case could be put over I could well not have had Reverend Beech. This is the problem, your Honor. And this is why I didn't go about trying to find an expert witness until I knew the case was going to trial. Now, this may seem backwards, but that was the logistical problem for me.

THE COURT: I am afraid I can't permit you to call these witnesses. You are going to have a continuing logistics problem that is not going to be solved. You will have to try to prove your custom and usage some other way. I am sorry, but it would just be unfair to the defendant in this case to be suddenly faced with an expert on the keystone issue of the case without really having had an opportunity to go into the individual's background so the jury can weigh the testimony. I am sorry, that is the only thing I can do.

(The jury was duly sworn and impanelled.)

[15] MRS. PIEL: May it please the Court, counsel, ladies and gentlemen of the jury: It is my privilege at this time to make to you what is called an opening statement.

Now, this statement that I make to you is not evidence in the case. The only evidence that you will hear will be from the witness stand from witnesses in this case. But the purpose of the opening statement of a lawyer is to advise the jury what the plaintiff, or what the party making the statement, intends to prove, because testimony, because it is the testimony of one person's observation, often comes in a piece-meal fashion and it is as though I were giving you a score card when I say "This is what we are going to prove in this case," and that is what I am going to tell you now.

The plaintiff, Sandra Adickes, is a school teacher in the New York City schools, and she was in the summer of 1964. That summer she went to the State of Mississippi as part of the program of the Council of Federated Organizations, COFO, to educate and to work with Negroes and with Ne-

gro youths in the South as part of the great civil rights movement which really began with the Supreme Court decision [16] in 1964, or I don't know when I can say it began, perhaps it began with the emancipation proclamation, but certainly in any event there was a program in 1964 which the plaintiff attached herself to. She went down to Hattiesburg, Mississippi, and there she went to a community about a half-hour from Hattiesburg called Palmer's Crossing. It was a Negro community separated from the white part of Hattiesburg. There the plaintiff lived with a Negro family and her duties were to teach Negro youths in freedom schools, which were formal sessions of students ranging from ten to twenty in the morning, in the afternoon and in the evenings.

She was a high school teacher in New York, she is a high school teacher now in New York, and she was teaching mainly children of high school age. She was teaching them about American literature, about Negro literature, about Negro history, and, of course, about the civil rights bill and the civil rights act and civil rights.

The classes went on through the summer, starting in July, and they were about to terminate at the end of August of 1964.

The students in her class discussed the [17] problems of civil rights in connection with their reading in the literature about Negro history and about the struggle for the rights of the Negro people. And in the course of their discussions the issue came up that as of July 1, 1964, there was a law of the United States that said that Negroes as well as white people could go to public places in the South and that they could go together, meaning the Negroes and the whites.

It will also come out in the evidence that it was not the policy of the Council of Federated Organizations, COFO, to test the civil rights bill that summer. The idea was to send people down to the South and start the great educational process that had to be started. It was not the purpose to test the civil rights bill, but rather to move peacefully in the communities where these people lived and to try to project the education as far as was possible in the limited summer program.

However, in the account of discussions in Miss Adickes' class, some of the young people—in fact, a number of them—started talking about what their new rights were as a result of the passage of the civil rights bill, and they talked about going [18] to various places in Hattiesburg, in the community where they lived, where they had never gone before. They talked of going to the drive-in, but for various reasons they decided against it. And one day about a week or so before August 14th, when the incident that is involved in this case took place, they decided that they would go to a public library in Hattiesburg.

After they made their decision, they talked about it with their teacher, Miss Adickes, and she said that she would go with them. So on August 14, 1964, they all put on their blue work shirts and blue work skirts, except for one boy who put on work pants, and dressed similarly as the many COFO workers who were working on this project throughout the South in 1964 dressed. Not all the time, but much of the time. They took the bus from Palmer's Crossing, this little Negro community, six of them, one boy of thirteen and five girls ranging in age from fourteen to sixteen. That is, six children and the plaintiff, Miss Adickes.

The bus ride was about a half-hour, and around 12:00 o'clock or a little after they arrived [19] at the library in Hattiesburg. When they went in, the librarian was on the telephone. She got off the telephone, and one of them heard her make a call for help. Then one of them went up and asked her for a library card.

A conversation ensued in which the librarian said didn't they know that this was a segregated library, and didn't they know that there was a 6th Street branch for Negroes, and they again said they wanted to use the library. The librarian tried to reason with them, told them that the White Citizens Council gave the money for the books and didn't want Negroes to use the library. Another librarian came in and argued that they should leave. Finally, one of the librarians said, "If you don't leave we will have to close the library," and one of the Negro children said, "Well, if we

can't use the library we can't see why it shouldn't be closed."

Thereafter, the librarian called the police, and the children and Miss Adickes—incidentally, before that happened they turned to Miss Adickes and asked what they should do, and she said, "Do you want to leave?" And they said, "No."

[20] So they sat down and read magazines, and in twenty minutes to half an hour, sure enough, the chief of police of Hattiesburg came to the library and closed the library, and they left, the six Negro youths and the plaintiff. They went out of the library. They made sure it was closed before they left, but they went out of the library and they went down the street, and by that time it was 12:30, 12:45, and it was lunchtime, and they were hungry. They first went into Woolworth's. Incidentally, I should say to you that there were a few places in Hattiesburg where at least the word was out that Negroes would be served, and Woolworth's and Kress were both among them.

They went into Woolworth's and the lunch counter was crowded, so after staying a few minutes they went on to the defendant's store, Kress. They went inside and Kress was not as crowded as Woolworth's, there were seats at the counter, but there weren't seven seats in a row, and there were two booths, two empty booths. There were people in the store, it was not an empty store, maybe seventy-five to a hundred people. It was a large store. [21] They sat down in the booths and they again waited a good while before anyone came over. Finally, someone, a waitress, came over to the booth where the plaintiff sat with three of the Negro children. The waitress took the orders of the three Negro children, hamburgers and whatever it was, and walked away. One of the Negro children called to the waitress, and I believe the plaintiff called, too, and said, "Come back, I want to give you my order." The waitress came back and said that they had to serve the Negroes but they didn't have to serve the whites who came in with them. A conversation ensued, the plaintiff said to her, "Don't you know that this is a violation of the civil rights bill?" And she said, "These

are the instructions of my manager." And Miss Adickes said, "What is the name of your manager?" And she said, "Mr. Powell."

The waitress then went to the other booth to take the orders of the other Negroes, and they told her that they didn't want to eat if their teacher couldn't eat with them, and the group peacefully got up and left, and shortly thereafter Miss Adickes [22] was arrested for vagrancy by a police officer who had come in the store just at about the time she was refused service.

Now, we will prove to you that this experience for Miss Adickes, involved as she was in the teaching and the dedication to the cause that she was involved in in Mississippi, was a very humiliating experience. It was humiliating because this was a great corporation, and this corporation was expressing its racial policies by refusing her service in a situation where it was humiliating, not only to her but to the Negro students to whom she was devoting her attention in terms of telling them about the dignity of life.

Now, we will not show you that as a result of this she lost any money, but we will ask you to consider at the appropriate time what your feelings are with regard to how this kind of conduct should be treated by a jury. Now, there will be a defense in this case, and the defense will be that—

THE COURT: Maybe you ought to let the defense say what it is going to be.

MRS. PIEL: The only aspect of that is to [23] say that—

THE COURT: However, I don't want you to be deprived of your opportunity to open to the jury.

MRS. PIEL: We are going to show that this is what happened, and I will just in one phrase say the defendant will tell you that this discrimination of the plaintiff which did take place, this refusal to serve her, did not take place because of any custom or any racial reason, but because there was going to be a riot in the store.

In essence, I have told you what we are going to prove to you from the witness stand with the plaintiff and with three of the young people who were with her at that time.

Thank you.

[24] MR. LITVACK: Your Honor, ladies and gentlemen of the jury:

As you already know, it is the function of an opening statement to tell you what the parties contend the case is really about, what the facts are, and what they intend to prove, and as part of this, of course, what they want you to look for in the proof.

Before I embark upon that, perhaps I ought to make comment about one thing that may arise in your minds.

His Honor has already told you that this case took place in Hattiesburg, Mississippi. By that I mean the incidents in question took place there. You may be wondering why is this trial in New York. It is in New York for two reasons. We were sued here, and properly so, because Kress is a New York Corporation. Then as you may or may not know, the defendant has a right, if it so desires, to remove the case to Mississippi or elsewhere. We did not do that. Kress wanted this case tried here in New York at this time. In discussing what we are here to try, and [25] what this case is really about, it seemed to me it might be well to tell you what we are not here to try, what is not involved in this case, because if we do that I think we can better focus on the issues here.

Ladies and gentlemen, we are not here to try 100 years of segregation in the South, in the State of Mississippi or anyplace else. We are not here to try all the injustices that have been done by people in Mississippi or elsewhere in this country. We are not here to apply different standards because some people talk with a southern accent and some people are from New York. We are not here to try, that because it has nothing to do with what happened. Not only that, ladies and gentlemen, but because there is no one here to defend these wrongs and injustices. Certainly Kress does not and I won't.

Then that raises the issue of what are we here to try. We are here to try what happened on August 14, 1964, at the Kress store in Hattiesburg, Mississippi, and why.

Now, what happened is really pretty [26] simple, because there isn't much dispute about it. What happened was, as you were told, that Miss Adickes, the plaintiff, came in with a group of Negro students, sat down, and the Negro students were offered service but Miss Adickes was refused service. Miss Adickes then got up and left the store. That is what happened. It is for that she seeks more than half a million dollars in damages. But the big question is why. Why did Kress refuse her? Kress will show you, and you will discover, that it refused her for one reason and one reason only, because when she was in the store on that day there was a real, live, actual threat of a riot and violence, not only to Miss Adickes but to the students who were with her, to the other customers in the store, and to our employees.

That raises the question, why was there a threat of a riot? Ladies and gentlemen, we will show you and you will discover why there was a threat of a riot. I ask you to listen very carefully to the testimony, to the things that the plaintiff did which were naturally, deliberately, foreseeably, calculated to result in the situation, [27] the danger situation, which later resulted in the Kress store.

For example, you have heard about the incident in the library. Let me tell you right off the bat the Court has already ruled that Kress had nothing to do with the library incident. Kress didn't even know she was at the library, nor could there be a claim to the contrary. It had nothing to do with us. But it was one of a series of acts performed by the plaintiff which led inevitably to the danger situation which later existed in our store. We are going to show you, ladies and gentlemen, and you are going to find the following: that on July 2, 1964, as you all know, there was passed what is now called the Civil Rights Act of 1964. You will find that just before that time the Kress Hattiesburg store for the first time opened eating facilities—that is, installed new lunch counter and eating facilities. It essentially consisted of a lunch counter, some stools and a few tables. In total it seated 47 people. You will find that from at least

July [28] 2, 1964, on Kress had a policy which was explained carefully to each of its store managers, which was in writing, and each of its store managers were required to sign and say "I understand and will obey," that no person would be refused service because of race, color or creed.

You will find that Kress served Negroes at its facilities at the Hattiesburg store. You will find that Kress served whites at its facilities at the Hattiesburg store. And we will show you that Kress served Negroes and whites together.

But we will also show you—and I don't think it will come as any surprise—that this was not always very peaceful. We will show you Mr. Powell, our store manager, was threatened, his wife and his children were threatened, our store managers were threatened. We will show you the White Citizens Council took out an ad in the newspaper condemning Kress and calling for aciton because of its policy of serving Negroes.

We will show you Kress was no friend of the White Citizens Council or anyone who stood for that type of thinking. Kress was a leader in [29] the community. Kress received publicity, this very store—I am not talking about Kress nationally; I am talking about the Hattiesburg store—received publicity in Time Magazine and other publications for its efforts at peaceful integration.

We will show you that on the day in question, August 14, 1964, it was a Friday, and it was in fact a payday for a major employer in Hattiesburg. We will show you the plaintiff and the group came into the store during the noon lunch hour, which, as you all know, is the busiest time of the day. We will show you that it is particularly busy on a Friday because the employer, the major employer in town, had paid its employees and they were in and about the store cashing checks, shopping and eating.

We will show you, as I say, a series of acts the plaintiff had performed which led to the incident at the store. We will show you that there had been violence throughout Hattiesburg, but particularly directed at white civil rights workers. We will tell you about a rabbi who was beaten up because he was walking with and associated [30] with Negroes. We

will tell you about a white civil rights leader who was punched and beaten because he had been with Negroes. This had just happened.

We will show you our store manager was very concerned about this and he talked to the head of the food department about a week or two before the incident in question, and he told her that "If it ever looks like there is a danger situation, and a group comes in the store, look to me, I will be on the floor, look to me for guidance, and I will make a decision on the spot as to what we can do. If I shake my head no, don't serve the white person."

On August 14, 1964, Miss Adickes and the group came in the store as you heard. The store was filled with people. There are going to be varying estimates as to how many. No one took a head count. We didn't have time. We estimate there were between 150 and 200. There is no doubt there were people on the street who followed Miss Adickes, looking in the store window.

You will hear testimony by the store manager the group started forming in the store and pointing and making noise and threatening. [31] You will find that faced with that situation, Mr. Powell, a veteran of Korea, who had seen riots before, made up his mind that the only way to avert bloodshed at that time was not to serve her. He shook his head "no" to the food superintendent, and Miss Adickes was, as you heard, not served. The Negroes were offered service, Miss Adickes was not. The group was not requested to leave but they did in fact get up and leave. The whole thing took a matter of a few minutes, as I am sure you can well imagine.

Well, now, you have heard some reference—and I want to dispel this right away too—to the fact that Miss Adickes was later arrested. Let me tell you this, ladies and gentlemen, again: The Court has held that Kress had nothing to do whatsoever with this arrest. It didn't even know about it. You will find out this came about later again as a part of the series facts the plaintiff had done.

[32] Now, you are going to hear about custom. You are

going to hear the contention that Kress did not refuse her because of this riotous situation but because there was some supposed custom. What was this custom, the custom that the plaintiff claims exists? The issue which you will have to decide is was there a custom of refusing service to whites who were in the company of Negroes while serving the Negroes. That might seem like a mighty strange custom to you, it does to me, but don't be surprised. We will show you there was no such custom. Kress had served Negroes and never refused to. Other than the instance in question, you will find that Kress never refused to serve whites with Negroes.

Face it, if it was a custom, there was one custom, and that was to discriminate against Negroes and not to serve Negroes.

We also know, and we will see, that Kress broke with that custom and Kress was a leader in word and deed from that day to this day in the civil rights movement, to see that Negroes and whites were served together and Negroes served alone, and [33] by avoiding a riot on that day Kress was able to continue with that policy.

At this stage I would ask that you listen very carefully to those acts taken by the plaintiff in a group which had the natural foreseeable, inevitable effect of leading to the riotous situation that later existed in our store, and then I ask you that when you listen to the testimony of Mr. Powell, our store manager, try to place yourself in his shoes standing in that store faced with that situation at that time and view the testimony from that standpoint and the entire manner from that point. If you will do that, we will greatly appreciate it.

Thank you.

SANDRA ADICKES

the plaintiff herein, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. PIEL:

Q. What is your business or occupation, Miss Adickes?

A. I am a school teacher in the New York City Public School System.

[34] Q. Where did you get your training before you were a school teacher? A. I have a bachelor's degree from Douglass College, a master's degree from Hunter College and am presently a candidate for a doctorate at New York University.

Q. How long have you been teaching in the New York City school system? A. This is my seventh year.

Q. In the year 1964 where were you teaching in the New York City school system? A. At Benjamin Franklin High School in Manhattan.

Q. Where are you teaching now? A. P.S. 8, which is what they call a 600 school, a school for disturbed adolescents, in Manhattan.

Q. When you were at the Benjamin Franklin School what grades did you teach? A. The 10th through the 12th grades, I taught English to them.

Q. Did there come a time when you decided to go to Mississippi in 1964? A. I guess I decided that some time before [35] 1964.

Q. When did you make that decision? A. I think it was around December. It was in the winter of 1963.

Q. How did you come to make that decision? A. I had been involved in a freedom school program in Prince Edward County, Virginia; and as a result of my experience there and the work there I decided it would be a good idea to continue that program, and I had a friend who also wanted to do something, and about that time we heard of the projected program for the summer of 1964 which the Council of Federated Organization was planning to mount.

Q. What was that program? A. It was to be a three-pronged program as part of the civil rights movement and it was to concentrate on education and political education and voter registration.

Q. What was to be your role in the program? A. As I discussed it with my associate, Mrs. Norma Becker, and with the members of the Council of Federated Organizations, we were to help set up a program for recruiting New York City [36] schoolteachers to go down to Mississippi to teach in the freedom schools, and we were also to prepare curricula and obtain materials and supplies for implementing the curricula in the freedom schools.

Q. When did you commence doing this? When did you commence preparations for embarking on this particular program for '64? A. I think we were discussing or began discussions in January of 1964.

Q. Did you make a preliminary trip before you went in the summer of 1964? A. Yes. We discussed it. We had many work sessions. We had discussions with our union, getting their support.

Q. What do you mean? A. United Federation of Teachers. And in June, the weekend of June 6th, I believe, 1964, Mrs. Becker and I flew to Jackson, Mississippi, to talk with members of COFO and to make plans for the summer and discuss with them where the teachers would go and to look at possible school sites.

Q. You came back to New York; is that correct? [37] A. Yes.

Q. Did you go back to Mississippi? A. Not immediately. We waited until the end of the school session in New York, which was about the end of June. We went to Memphis before.

Q. This was in preparation for the summer? A. Yes.

Q. What was the preparation for the summer with regard to this? A. Mrs. Becker and I had held a session in New York for the volunteers, to let them know what our feelings were, what we had seen and what their responsibilities were, and to inform them of the dangers involved. We did that in New York City.

Q. When was that meeting held in New York City? A. Some weekend in June, perhaps the weekend after we came back.

Q. These were teachers that were planning to go with you? A. Yes.

Q. How many were there? A. Between 20 and 30 people at the meeting. Then we went down, not all together, in [38] the beginning of July of 1964, first to Memphis for a three-day orientation.

Q. What happened at that conference in Memphis? A. We heard tapes of discussions and lectures that had been given at the big orientation for the college students at Oxford, Ohio. We heard a recording of a discussion by Staughton Lynd and a minister whose name I do not remember who was involved in the project. We had discussions of the ruling conditions in the South. We had a number of work sessions on non-violence and how to respond in situations where we were threatened, and very often these were acting-out situations where we would improvise, line up chairs and pretend we were in a car and pretending we were being stopped by a sheriff on a rural road and how do you respond. There was an enactment of an arrest situation.

Q. This all took place in Memphis? A. That's correct.

Q. How many people attended the Memphis conference? [39] A. We were not the only ones participating in that conference. Some of us were from New York, and I would say maybe 75 people altogether at Memphis at that time.

Q. Besides teachers going down to Memphis were there other people going? A. Yes. Students, doctors, lawyers, some physicians, they came later, and ministers.

Q. When did you go to Mississippi to start your project in 1964? A. We came into that state on July 4th.

Q. When you say "we," how many were you? A. I think there were seven or eight of us who traveled on the bus from Memphis down to Hattiesburg on July 4th.

Q. Were there Negroes with you in that group? A. One, a young man named Bill Jones.

Q. Did there come a time when it was determined where

you were going to go? A. Well, this had been discussed at the meeting in Jackson before I went down and someone suggested that I go to Hattiesburg.

Q. Incidentally, you spoke about the voter [40] registration and education. What was the purpose with regard to the Negro community of that program, the Negro community in the South?

MR. LITVACK: I will object, your Honor. I don't see what relevance that would have.

MRS. PIEL: I will withdraw that.

BY MRS. PIEL:

Q. How did you decide to go to Hattiesburg? When was that decision made? A. I think it was decided that June weekend.

Q. Where did you go in Mississippi or in Hattiesburg? A. We arrived at the bus terminal and we were given a telephone number to call, it was the COFO office. We called there and someone came and got us, Reverend Beech came down, and he drove us to a 4th of July picnic that was being held surreptitiously in the rural Negro community of Hattiesburg.

Q. Then where did you go? A. We went to the picnic and this was in the midafternoon. We met members of the community there. I think it gets dark fairly early there, even in the summer, so about 5:30 or 6 someone [41] said, "It's getting dark and we better get out of here." We were put in cars belonging to members of the community and we were vaguely assigned to different people's homes, and I was driven to the home of Mrs. Addie Mae Jackson in Palmer's Crossing, Mississippi.

Q. That was to be your home for a number of weeks thereafter? A. Yes.

Q. Thereafter you set up certain classes? A. Yes. This was Saturday. The following Monday we went to the different churches where the leadership of the project at Hattiesburg decided we would go, and I was instructed to go to the Priest Creek Baptist Church where the school would be set up.

Q. How large a community was the Priest Creek Baptist

Church? A. Palmer's Crossing? It's a small town and I am not very good at estimating numbers. I imagine several thousand people lived there.

Q. Did you set up your own classes in the church? [42]

A. Well, there were other teachers working with me, and I think the evening before we had prepared our presentation and the substance of our discussions and the structure of the program.

Q. How many classes did you have? A. Well, the emphasis from the beginning was that it was not to be instruction in a formal classroom situation, but we were to be very free and improvise, and it was decided that we would introduce ourselves first of all to the students and then we would have, as in a team teaching system—we would have a master teacher give the main presentation, which was to be a lecture in Negro history, and we would break up into small discussion groups, and I would take some of the students, not chosen in any particular way, and break up and discuss the material presented in the lecture.

Q. How many teaching hours did you spend in this activity?

MR. LITVACK: I will object. I have let this go on for a while. I think it is totally irrelevant.

THE COURT: I think it is. I think it [43] is also a good time to go to lunch.

(Luncheon recess taken.)

AFTERNOON SESSION

(2:05 p.m.)

(Jury present.)

* * *

Q. Miss Adickes, at some time during the summer of 1964 classes began in freedom schools; is that correct? A. Yes.

Q. When was the first class day? A. Monday. I guess that would be July 6th.

Q. How many groups of students did you teach? A. Well, it is hard to say if by groups you mean classes. We had

about 80 students altogether at the school, and I imagine I taught every one of them at one time or another.

Q. How were sessions arranged? Was it all day long, was it in the evening? A. We had sessions in the morning from 8:30 to 11:30, and then in the evening from about 6:30 to 8:30.

Q. What were the subjects that you led the discussions or talk in?

[44] MR. LITVACK: Objection, your Honor. It seems to me totally irrelevant.

THE COURT: It seems far afield. It is interesting but not pertinent.

MRS. PIEL: I can shorten it, but it is only to complete the picture of what I said in my offer of proof with regard to what classes she taught.

THE COURT: I didn't want to interrupt your order of proof or your offer of proof in your opening statement, but let's try to keep to the issues.

MRS. PIEL: I am going to get to August 14th in about two seconds, if I could just ask what classes she taught.

THE COURT: All right. Fine. That is all we want.

MR. LITVACK: Fine. The sooner we get to August 14th the better.

MRS. PIEL: I understand.

BY MRS. PIEL:

Q. What classes did you teach? A. I taught classes in American Negro [45] literature specifically. I also taught classes in Negro history, and we discussed current problems, current social, political and economic problems in Mississippi.

Q. Did there come a time when you discussed the effect or when you participated or listened to discussions on the effect of the 1964 Civil Rights Bill? A. Yes.

Q. When was the first discussion of that that you remember? A. It is hard to pinpoint it. I am sure it began very early in the summer, and I am sure the discussions continued throughout the summer.

Q. Did there come a time when a group of your students talked about going somewhere together that they had not

been able to go to before the passage of the Civil Rights Bill?

MR. LITVACK: I object, your Honor. It is obviously leading.

THE COURT: I think we better lead a little so we can get through.

MRS. PIEL: I was trying to hurry through.

[46] THE COURT: I will permit a certain amount of leading.

A. Yes, they did.

Q. About when was that? A. I would say about the first or second week of August.

Q. What was that discussion? A. The had told me of a plan—

MR. LITVACK: Objection. They are going into hearsay as to what they told her. I don't see how that is admissible.

THE COURT: Why don't you say what was said at the discussion. Let's see if we can't get to the 14th of August.

BY MRS. PIEL:

Q. Was there a decision to go somewhere in Hattiesburg where the students had not gone before? A. Yes.

Q. In the conversation did you tell them to go there or did you ask them to go? A. No.

Q. And where did they decide to go? A. They had discussions outside of the classroom. They decided at first to go to the [47] drive-in in Hattiesburg, and apparently they decided against that because of the lack of transportation and the danger involved in a drive-in.

Q. Did there come a time when they decided to go to the library? A. Yes.

Q. When was that? A. I think they had discussions outside of classes, and I think it was some time around the middle of August, the 10th or 11th of August.

Q. When did they tell you about that? A. They told me the Monday, or about then—the Monday before we went to the library.

Q. What did you say to them with regard to your accompanying them? A. I don't remember whether they asked

me to go and I said yes, or whether I offered to go or whether it was so in unison at that point it was just assumed that I would go. It was like that.

Q. So on the 14th of August what happened? A. We had classes in the morning, and at the end of classes we took a bus from Palmer's Crossing into Hattiesburg.

[48] Q. Who is "we"? A. We, myself and the six students.

Q. Who were they? A. Curtis Duckworth, Jimmella Stokes, Diana and Caroline Moncure, Lavon Reed, and Gwenn Merritt.

Q. And what were their ages? A. Curtis I remember was 13, and the girls ranged in age from 14 on up to about 16.

Q. Had these been students in your class all summer? A. Yes, they had.

Q. You say you took a bus from Palmer's Crossing. About what time of day? A. We got the bus just about 11:30, I would say.

Q. Before you got the bus was there some discussion about what you would wear that day? A. We had blue denim work shirts which we had worn to school very often during the summer. We called them freedom shirts. And we decided that we would wear them that day. And we wore our blue denim blouses. Some of us wore blue denim skirts. Curtis, I don't believe, had blue denim pants on, but he had on a blue blouse, I believe.

[49] Q. What did you do after you got to Hattiesburg on the bus? A. We got off the bus on Main Street and we walked to the library, a few blocks away on Main Street. We went into the library—do you want me to continue?

Q. Yes. Tell us what happened. A. We went into the library and there was a young girl working at the desk and she saw us come in. We approached the desk, and she had been on the telephone, and when she saw us come in she immediately cut off her telephone conversation and called, I guess, on an intercom for her supervisor to come upstairs. The students and I approached the desk and said we would

like to take out library cards. She said "I am sorry"—

MR. LITVACK: Objection, your Honor; going into hearsay, it seems to me, as to what someone at a library said. It seems to me clearly hearsay and inadmissible.

THE COURT: It is hearsay.

MRS. PIEL: Your Honor, this is an incident alleged in the complaint as to what took place. [50] We are talking about custom and usage and what happened in the State of Mississippi; and this is directly relevant.

THE COURT: Here we are dealing with custom and usage in a library.

MRS. PIEL: It is a public place, however.

MR. LITVACK: Your Honor, it seems to me it is clearly hearsay, and the fact you put it in a complaint doesn't change the rules of evidence in this court.

THE COURT: That is obvious.

MR. LITVACK: I think that is obviously and I think it ought to be excluded. I think we ought to stick to what happened.

THE COURT: I think she ought to say she had a conversation with her and as a result of the conversation they left. I don't think she should testify what was said.

[51] Q. Without describing anything said by anyone in the library, can you tell us what happened? Describe what the people did and what you saw without saying what was said. A. The request for library cards was denied—

MR. LITVACK: Objection. Move to strike.

THE COURT: We are getting into indirect hearsay if not hearsay. Strike it.

Q. Can you describe what happened without describing what was said? A. We sat down at the library desks.

Q. After a period of time? A. Yes. We waited.

Q. You had a conversation with the librarian? A. I didn't. The students did. We waited. After twenty-five minutes or a half an hour the police chief entered. He approached the library desk. There was conversation. He came over to me and asked me a question. I replied. We were instructed to leave. We left.

Q. And was there anything said by anyone about the White Citizen's Council?

MR. LITVACK: Objection.

THE COURT: I will sustain the objection [52] to that.

Q. Then after you left, what happened? A. We walked downtown, back down Main Street. We went to Woolworth's. The lunch counter was crowded. We waited a few minutes. We left. We went to Kress. We sat down in two empty booths. We waited—

Q. When you entered Kress— A. Yes.

Q. —what did you observe with regard to how crowded the store was? A. I can't say exactly how many people there were there. There were people on the sidewalk, there were people in the store. There was a number of people. There were not as many people in Kress as there had been at Woolworth's because we were able to find booths. It was not very crowded.

Q. There were empty seats at the lunch counter? A. There were, but not seven together.

Q. After you sat down in the booth, what happened? A. We waited—

Q. Now you can tell us what happened. A. We waited about ten or fifteen minutes, and [53] finally a waitress approached and distributed menus to us, and then the students at my table—I was sitting with three of them—

Q. With what three were you sitting? A. I was sitting with Jimmella, with Diana and with Lavon. And I am not sure whether it was Lavon or Gwen, either one. I am certain of Jimmella and Diana but not of the other. Curtis and Carolyn and either Lavon or Gwen were at the next table. The waitress distributed menus to us and took the students' orders and—that is, the order of the students that I was with, and then she did not take my order, so we called her back, I think both the students and I did; we called her back. And she came back and we said, "You haven't taken"—I said to her, "You haven't taken my order yet," and she said, "Well, I am not going to." And I said, "Why not?" She said, "Because my manager told me not to serve

you." And I said, "Do you realize that this is a violation of the civil rights act?" She said, "Yes, but my manager told me not to serve you." She said, "We have to serve the colored but we are not going to serve the whites that come in with them."

There may have been one or two comments [54] along that line. I know I asked her for the manager's name and she told me it was Mr. Powell. And then I think she approached the next booth and asked the students what they wanted, and they all said, "If you are not going to serve Sandie, we don't want anything," and we got up and left.

Q. And then what happened to you immediately after that?

MR. LITVACK: Objection, your Honor. I think that the testimony in this case is relevant to what happened at Kress, and she has told us what happened.

THE COURT: I think we already have a ruling, what happened afterwards has no bearing on this particular situation.

MR. LITVACK: Yes, your Honor.

Q. How did it make you feel when the waitress turned you down? A. Well, it came as a surprise. I hadn't been expecting it. We had heard that Kress was serving, was one of the places in town that were now serving Negroes, and I had not anticipated this kind of response. And I was shocked, and also the denial provoked a kind of visceral reaction, when you are told, "We are not going [55] to serve you."

There is a rejection, and you feel it, you feel it physically, or I felt it physically: At the same time I was aware of the denial to me in the presence of students I had been working with all summer, and I also felt the larger significance of being—of everything I was there for, all that I was working for, indeed, all that I attempted to introduce into my teaching, all of this that I stood for was being rejected, being denied.

And I felt a number of things—shock, humiliation, anger, and I guess a sense of the injustice of it.

Q. Now, in the account of your presence in Mississippi in June and then later from July through August, did you familiarize yourself with the custom and usage in Hattiesburg of the general community there, the general white community? A. Yes.

Q. With regard to serving white persons in the company of Negroes in public places? A. Yes.

Q. And what was that custom?

MR. LITVACK: Objection, your Honor. First [56] of all, there has been no proper foundation laid, quite obviously. The witness testified she had been down there for a weekend in June, two days, and then vaguely in July, and then she is asked a conclusion, "Have you observed a custom?"

THE COURT: I think she can base it on specific instances she observed.

MR. LITVACK: If that was the question, yes.

MRS. PIEL: Your Honor, doesn't that go to corroboration and to the weight of this testimony? She said that she was there and that she is familiar with the custom, and now I am going to ask her—

THE COURT: I think you have to consider her qualifications even to given an opinion. The weight of the opinion, naturally, will be for somebody who is qualified as an expert, subject to attack on cross-examination, but I don't think that if the qualifications are lacking by means of observing she could testify to a custom and usage in a community without having either personally or even extending it to hearsay, having heard of specific instances of this happening or merely say it was a custom and usage in this community to do a certain [57] thing on the mere statement that she is qualified or considers herself qualified without more. It is meaningless, isn't it?

MRS. PIEL: I think under the circumstances we have a school teacher—

THE COURT: You could ask me if I felt I was qualified to give an opinion and then I could say, "Yes," and then I could give it, but what is it worth?

MRS. PIEL: I think there is a distinction. She went down to Mississippi with a precise purpose, and we already

have testimony as to what her purpose was. She was concerned with the racial issues.

THE COURT: She went down to teach, I thought.

MRS. PIEL: She went down to teach, but with a concern for the very issue that I am putting to her. We have her educational qualifications. We have the fact she was down there for a period. I will ask her some more questions, if your Honor feels that is necessary for me to qualify her, but it would seem to me—

THE COURT: I think you have to ask her if she knows of specific instances of white people being [58] refused service because they were in the company of colored people, and that such occurrence was such a frequent one that it was in the category of a custom and usage. Not just that colored people were refused, because we don't have that situation here.

MRS. PIEL: I understand that.

THE COURT: We have the custom and usage which you are alleging, that white people wouldn't be served in the company of colored people, as I understand it.

MRS. PIEL: Yes, yes. Of course, one cannot have too many examples of something that is a rejection because at a certain point people stop. But I will nonetheless pursue the line of questioning.

THE COURT: I don't quite understand that.

MRS. PIEL: Well, if a custom and usage exists against something, one doesn't always have too many instances.

THE COURT: Let me put it this way: If a custom is not to serve colored people this instance would never arise, would it?

MRS. PIEL: Correct, your Honor.

THE COURT: I don't know. I am not voicing an opinion. I am just finding out what we are facing.

[59] During the period you were there and in your research prior to the time you went to Mississippi, did you have occasion to know, of your own personal knowledge or of having heard of instances, where white persons in the company of Negroes were not waited upon in public places?

fact not in evidence, namely, that there was research on Miss Adickes' part.

THE COURT: I think you ought to lay a little more foundation.

Q. Have you done research in the area of racial custom in the southern part of the United States? A. I have read a number of books—I had read a number of books prior to going to Mississippi, among them James Silver's "Mississippi, the Closed Society." James Silver was at the time a professor of history.

MR. LITVACK: Objection, your Honor. The witness is making a speech.

A. (Continuing) I read several books.

THE COURT: I will permit that.

Q. While in the course of your being in [60] Mississippi did you make it your special concern or did you pay special attention to the relationship between the Negroes and white community and the custom and usage of the white community towards Negroes in the company of whites and whites in the company of Negroes? A. It was so pervasive as to be inescapable.

Q. Did you give particular attention to it? A. Yes.

Q. What did you observe? A. I observed that—

MR. LITVACK: Objection, your Honor. I don't think there has been any foundation laid. I just think we are going round and round. The witness has not yet testified on a proper foundation that she knows of specific instances prior to August 14, 1964, in Hattiesburg, Mississippi, where in white people were discriminated against because they were in the company of Negroes.

MRS. PIEL: I will proceed and go forward, if I may.

THE COURT: I don't want to restrict you unduly but to me the mere statement that this woman observed a certain amount of hostility between whites [61] and blacks in the community, let's say, doesn't go to the issue here: Was there a custom and usage in the community of not serving white people because they were in the company of Negro people?

MRS. PIEL: Your Honor, I thought that was the nature of my question. I was talking about that, not the hostility—

THE COURT: It was not in the nature of the answer you were getting. I am trying to tell you and the witness that.

Q. Did you have occasion to know of specific instances where white persons in the company of Negroes were discriminated against? A. Yes.

Q. How many such instances can you recall? A. I can think of about three at the moment.

Q. Will you describe the three instances to us? A. I know that people were turned away from a white church, an integrated group was turned away from a white church in Hattiesburg. I was not present but this was explained to me. I saw a rabbi being beaten because he was in the company of Negroes.

[62] Q. This was a white rabbi? A. Yes. And people were turned away from a drug store in Hattiesburg, an integrated group. I don't remember the name of the drug store.

Q. On the basis of what you studied and on the basis of what you observed, and on the basis of your conversations with other persons there, did you come to a conclusion with regard to the custom and usage with regard to the white community towards serving persons, white persons, in the company of Negroes? A. Yes.

Q. What was that conclusion? A. The conclusion was that white persons—it was a custom and usage not to serve white persons in the company of Negroes.

MRS. PIEL: Thank you. You may cross-examine.

CROSS EXAMINATION

BY MR. LITVACK:

Q. Miss Adickes, I believe you mentioned that you were part of a Freedom School project, is that correct? A. Yes.

Q. Who was the head of that Freedom School [63] project? A. Are you talking about the one in Mississippi?

Q. Yes, ma'am. A. What do you mean "the head"?

Q. Was there someone in charge? A. A general director and in Hattiesburg we had two immediate directors.

Q. Who was the general director? A. Staughton Lynd.

Q. When was the first time you went to Mississippi in conjunction with this project? A. I think I said earlier the first time was the weekend of June 6th or so, 1964.

Q. Had you ever been in the state before that time? A. No, I had not.

Q. On this trip, weekend in June, did you go to Hattiesburg? A. No, I did not.

Q. When was the first time you went to Hattiesburg? A. On July 4, 1964.

Q. On this trip in June, did you meet Mr. Lynd at that time? [64] A. Yes, I did. Not in Mississippi. We had an hour between planes. We had a connection in Atlanta and we went to Atlanta and we spent an hour discussing the Freedom School project with him in Atlanta.

Q. Had you met him before? A. In the curriculum conference in March that we had held in New York, in March of 1964.

Q. Was he active with you and others in planning the curriculum for these schools? A. Yes.

Q. He helped plan them and you participated in that? A. Yes.

Q. On this trip to Mississippi in June of 1964, I believe you said you met with various COFO people? A. Yes.

Q. These are staff people? A. Yes.

Q. COFO, as I understand it, has no regular membership, as such? A. It never did, really, and the organization, as such, is defunct at the moment.

Q. Did you discuss with these people when you [65] were in Mississippi whether or not you should participate in any tests of the civil rights bill? A. I don't remember specific instances of that at that time. I don't remember specific discussions of that at that time, no.

Q. Are you saying that you did not at that time discuss it or you don't recall? A. We may have. I don't recall. I know we spent most of our time discussing the community life and our role as teachers in the Freedom School project.

Q. Did you discuss the possibility of violence? A. Yes.

Q. Were you told that there was a chance, a grave chance, of violence in Mississippi? A. Yes.

Q. Is it not a fact, Miss Aidckes, that you wrote articles for various publications after you came back telling the other teachers about the great chance of violence and warning them of that? A. Yes.

Q. There came a time when you went to Memphis, Tennessee? A. That's right.

[66] Q. For an orientation program? A. That's right.

Q. Were you told at that time that you were not to participate in civil rights tests? A. We were told that policy was not to have tests in civil rights act, yes.

Q. This was the policy throughout the summer, is that correct? A. Yes.

Q. The acts which you took on August 14th were in violation of that policy? A. Yes.

Q. Isn't it a fact that this policy was formulated to protect you and others from violence and injury? A. I suppose that was the rationale.

Q. Then you went ahead on August 14th knowing that and violated those instructions? A. Yes.

Q. Did Staughton Lynd speak at the school in Memphis? A. He was not there personally. We heard a tape of his earlier discussion at Oxford.

Q. He spoke to you through this tape, in other words? A. Yes.

[67] Q. Were you warned again in Memphis about the violence that might occur? A. Yes.

Q. You were told again about it? A. Yes.

Q. Prior to August 14, 1964, Miss Adickes, had you ever sought service in Hattiesburg, Mississippi, in the company of Negroes? A. No.

Q. Never? A. Never.

Q. You never had been a party to any such group, is that right? A. No.

Q. Had you ever observed any other group of Negroes and whites go into any store in Hattiesburg, Mississippi, prior to August 14th? A. I don't recall any, no. I didn't see many people from our organization go into stores.

Q. Am I correct that you do not know of any other occasion prior to August 14th which you personally observed where Negroes and whites sought service in a store in Hattiesburg? A. I know of one. I was not present at one. [68] I know of the attempt to go to a drug store.

Q. You were told about that? A. Yes.

Q. Do you know of any instance in which Negroes were offered service but a white person in their company was refused? A. No. That group was rejected in toto.

Q. The Negroes refused service, is that right? A. Yes.

Q. Do you know of any instance prior to August 14th where the Negroes were offered service and the white person was refused service? A. No.

Q. You had never even heard of that before August 14th, isn't that correct? A. Yes.

Q. When you went to the Kress store on August 14th, am I correct that you knew that Kress served Negroes? A. Yes.

Q. That's one of the reasons you went there, isn't that true? A. Yes.

Q. If I also understand you correctly, you [69] knew of instances of violence that happened in town? I think you mentioned a rabbi? A. Yes.

Q. He had been beaten up? A. Yes.

Q. He had been beaten up because he was walking down the street with some Negroes? A. That's correct.

Q. Was this in Hattiesburg? A. Yes.

Q. He had not sought service in Hattiesburg, had he? A. No.

Q. Did you know of any other instances where white civil rights workers were beaten up in Hattiesburg? A. No.

Q. Do you know Mr. Werner, a white civil rights worker, who was assaulted? A. I am not sure.

Q. You know of other instances of violence nonetheless? A. Yes.

Q. When you decided to go to the library, am [70] I correct that you did not tell anyone prior to making the trip on August 14th? A. That's right.

Q. Am I correct that you didn't even tell the parents of the children involved? A. I didn't discuss it with them, no.

Q. As far as you know, no one knew you were coming into town that day? A. The children knew and they told me that their parents knew they were going to town.

Q. I want to know what you did. Did you tell their parents? A. No.

Q. As far as you know, did anyone else know that you were coming into town that day? A. I knew their parents knew they were going to town.

Q. Forget that. Did anyone else know? A. I don't think so, no.

Q. To your knowledge, no one from Kress knew you were coming to town? A. We didn't know we were going to Kress.

Q. No one from Kress knew you were going to town? [71] A. No.

Q. I think you said you had all dressed alike on this particular day? A. Yes.

Q. In what you described as an outfit or uniform which showed one's participation in a movement? A. It is not a uniform.

Q. Outfit? A. Yes.

Q. Dress? A. Yes.

Q. You had done this by prearrangement? A. Yes.

Q. Had you ever come into town dressed like that before? A. Yes.

Q. With a group of Negroes? A. No.

Q. To your knowledge, had any group of Negroes and whites come into town like that, dressed alike? A. No.

Q. Did you discuss or consider the effect that this might have upon the townspeople or anyone else? A. No.

[72] Q. Did you consider that this might cause violence? A. No.

Q. That it might agitate anyone? A. No.

Q. You knew these prior acts of violence though? A. Yes.

Q. These students with you on that day, were they in

one class of your? A. It was not formal classrooms. They were not all together in one class. We had met at various times during the summer and I had taught each and every one of them on numerous occasions.

Q. As you had all the other students in the school? A. That's right.

Q. This is not one class that came to you and said, "We want to go to the library"? A. A group of friends.

Q. Varying students throughout the school? A. Yes.

Q. Am I correct that as far as you know, there was no communication between anyone at the library [73] and anyone at Kress concerning your presence there? A. That's right.

Q. As far as you knew when you walked into the Kress store that day, no one at Kress knew you had been at the library? A. That's correct.

Q. How far a walk is it from the library to Woolworth's?

A. I would say about five or six block walk.

Q. Did the seven of you walk it together? A. Yes.

Q. What street did you walk down to get to Woolworth's?

A. We turned off Main Street and I don't remember the name of the street we turned off.

Q. These five or six blocks, what street are they on? A. We walked down Main Street and crossed intersecting streets. I don't remember the names of the streets.

Q. Isn't it correct that you walked down five or six blocks to Main Street and you came to the corner of Pine and Woolworth's was a little way down Pine Street? [74] A. Yes.

Q. As you walked down the street were you walking in a group of seven or were you walking two or three together?

A. I am sure we were not walking seven abreast. We were walking in twos and threes.

Q. Were you talking? A. Yes.

Q. What were you talking about? A. No doubt talking

Q. The incident at the library? A. Yes.

Q. As you came to the Woolworth's store did you notice

people about the street looking at you as you walked down the street? A. People were stopping to look at us.

Q. Did you notice as you came into the Woolworth store that there were police about? A. Yes, I think I remember police.

Q. The Woolworth store was very crowded? A. Yes.

Q. You subsequently left the Woolworth store? A. Yes.

Q. By the way, am I correct that you were [75] aware of police all around you from the time you left the library?

A. We were not cordoned off but there were police around. There were always police in Hattiesburg.

Q. You were aware of five or six policemen around the Woolworth store alone? A. It may have been two or three. I didn't count them.

Q. You are not sure there was five or six? A. No, I am not sure.

Q. At any rate, am I correct you would say there were quite a number of them all around? A. What do you mean by "quite a number"?

Q. Let me read to you from your deposition. Do you recall being asked this question:

"Q. As you left the Woolworth store did you notice a police car? A. Yes. There were police. Quite a number of them all around."

Does that refresh your recollection that there were quite a number of police? A. At this point I don't remember the exact number. There were not a whole line of cars. There may have been two or three police cars which at the [76] time seemed like quite a number.

Q. I understand you gave this deposition a year or two ago and I guess it is harder to remember today than two years ago? A. On the other hand, my memory is perhaps finer on certain details now than it was then.

Q. Have you had an opportunity to refresh your recollection since the time of the deposition? A. I have reread it, yes, and I have gone over in my mind the events of the day.

Q. When you came to the Kress store, you went and sat

down at the booths you described, is that correct? A. Yes.

Q. When did you make your estimate as to the number of people that were in the store? A. I never made an estimate while I was there. You, I think, asked me how many and I said "Perhaps a hundred."

Q. You don't really know? A. I know the store which is a large one was not very crowded.

Q. You would estimate how many? 100? A. Yes. I really don't claim any accuracy [77] about that either.

Q. Did you ever see, during the time you were in the store that day, the store manager? A. I was not aware of him at all.

Q. You didn't see him at all? A. No.

Q. Which way were you facing, by the way? A. I was facing the rear of the store. My back was to the door.

Q. Toward the front of the store? A. Yes.

Q. Would you have been able to see the people standing behind you? A. No.

Q. If the store manager were behind you, you would not have seen him? A. No.

Q. If people were in the store behind you, you did not see them? A. Except the occasions when I turned my head.

Q. Did you turn your head a couple of times while sitting there? A. I think I did.

Q. You never saw the store manager? [78] No.

Q. Did you see him outside on the sidewalk? A. Yes. I saw people there.

Q. Did you see them looking inside? A. At this moment I don't remember whether I did or not.

Q. You can't recall right now? A. Yes. I know I saw people going about their business on the street.

Q. I believe you said you sat in the store about ten minutes? A. Yes. We sat together ten minutes before the waitress approached.

Q. Did you see the waitress during the time you were sitting in there? A. Yes.

Q. What was the waitress doing? A. She was waiting on other customers or standing and talking to co-workers.

Q. Both? A. Yes.

Q. How many co-workers were there behind the counter?

A. One or two others behind the counter.

[79] Q. Did anyone call over the waitress to come over and serve you? A. Finally after waiting ten minutes—I think one of the students did, yes.

Q. Now you think one of the students did? A. I am not sure about that.

Q. What did you do during the ten minutes you were seated there? A. We were discussing or talking together.

Q. Talking about the library incident? A. I am sure.

Q. Did you talk to the people at the booth with you?

A. Yes.

Q. Did you talk to the people at the other booth? A. Mostly we were talking together in our two booths.

Q. Did you talk to the people in the other booth during the time you were sitting there? A. Yes.

Q. Did you talk about the librarians? A. I think we probably did.

Q. The people in the store were going about [80] their business and no one paid any attention to you? A. I was not paying too much attention to the other people in the store. I think mostly they were going about their business and I am sure they stared at us a couple of times. Those who were walking the aisles near us stared at us, I am sure.

Q. Did anyone point? A. I didn't see anyone point.

Q. The rest of the store was going about its business?

A. That's right.

Q. Did that strike you as unusual? A. What?

Q. The fact that no one paid any particular attention to you? A. No.

Q. You didn't expect anyone to? A. No.

Q. You didn't expect any incident to occur, did you?

A. No, I did not.

Q. Although you knew of these prior acts of violence you told us about? A. That's right.

[81] Q. You knew about the rabbi being beaten up and all the other things but on this day you did not expect any-

thing to happen and nothing did, in fact, happen? A. We were doing such a normal thing that it did not seem that there was anything out of the ordinary about it.

Q. As far as you knew, it was perfectly normal and there was nothing wrong with it? A. That's right.

Q. You are not aware of any custom which proscribes or prohibits that, if it was a normal thing? A. We knew of the proscription, yes, and the custom and usage but we thought we were in one of the places where the custom had changed recently. I knew that Negroes had been served there and I had been served there on several occasions so we thought that now would be all right to eat there together.

Q. There was, you say, a custom about not serving whites and then there had been violence throughout the town and you came in town all dressed alike and went to the library, went down the street to the Woolworth store, followed by the police into [82] the Kress store, sat down, knew this custom, knew this violence and no one paid any particular attention to you, is that correct? I want to make sure I have this right. A. Yes.

Q. You were not surprised because you didn't expect anything to happen? A. No, I didn't.

Q. I think you told us you asked for the manager's name? A. Yes.

Q. Did you see the manager afterwards? A. No.

Q. Did you ask to see the manager? A. No.

Q. Did you ever attempt to talk to the manager? A. No.

Q. Did you ever attempt to talk to anyone at Kress? A. No.

Q. You were not asked to leave the store, were you? A. I was told that I was not going to be served at the lunch counter.

[83] Q. Were you asked to leave the store? A. No.

Q. You noticed people in the store watching you? A. Yes.

Q. How about the people out in the street? Did you notice them? A. My back was to them. I was not terribly aware of what they were looking at.

Q. As you walked out of the store did you see people

on the sidewalk looking in? A. They were looking as we walked out, yes.

Q. They were looking at you? A. Yes.

Q. I think you told us about this shock and humiliation you felt, is that correct? A. Yes.

Q. I believe you said you were shocked and humiliated because you were refused service? A. Yes.

Q. And because of the people you were with? A. Yes.

Q. This was not the first time you were ever refused service, was it? A. That's true.

[84] Q. It was not the first time? A. It was not, no.

Q. This had happened to you before? A. Yes.

Q. Not in Hattiesburg? A. No.

Q. And not at Kress? A. No.

Q. It happened to you in Richmond, Virginia, where you had been in a group that had been refused service? A. Yes.

Q. Negroes and whites together? A. Yes.

Q. Did you bring suit at that time for your shock and humiliation? A. No.

Q. You did not bring suit? A. No.

Q. Have you since August 14, 1964, participated in any other march or protest or demonstration? A. I have attended meetings. When you talk about protest or demonstration—

Q. March? [84a] Yes, I have.

Q. You have participated in others; is that right? A. Yes.

Q. Since August 14th? A. Yes.

[85] Q. When was the most recent one? A. What do you mean? I don't know what you mean. Marches, demonstrations, what are you talking about?

Q. Have you participated in any marches since August 14, 1964? A. I haven't participated in any civil rights marches, no.

Q. I didn't say that. I asked have you participated in any. A. I would like to know what you mean.

Q. You don't understand? A. I march. I march with friends sometimes. You know. What do you mean by a protest or demonstration? I have gone to hearings at the Board of Education.

Q. You think that is what I mean? A. I don't know. I want you to tell me what you mean.

Q. By the way, as of August 14, 1964, had you ever seen a riot, personally see one? A. No.

Q. Had you ever seen, prior to that date, a mob incited to violence? [86] A. No.

MR. LITVACK: Thank you. That is all.

THE WITNESS: I didn't see it that day.

BY MR. LITVACK:

Q. But you had never seen it before that day? A. No, nor since.

Q. Nor since? A. No.

MR. LITVACK: Thank you.

REDIRECT EXAMINATION

BY MRS. PIEL:

Q. Miss Adickes, you were asked about having been refused service in Richmond, Virginia? A. Yes.

Q. Was that before the passage of the Civil Rights Act? A. Yes, it was.

Q. And was that when you were in Prince Edward County in Virginia? A. Yes.

Q. The preceding summer; is that correct? A. Yes.

Q. Other than that occasion you had not been [87] refused service before? A. No.

Q. Or on any other occasion? A. No.

Q. When you were walking down the street talking after you had left the library, do you recall what was said with regard to the library experience? You remember you have not testified as to what was said previously. A. I think—

Q. I just want whatever you said as you were walking down the street after you left the library, to the best of your recollection. A. I do not recall clearly. I know that we were all very agitated at that point.

MR. LITVACK: I object. The witness was asked a question as to what she said. If the answer is she can't recall, that answers the question. I object to her characterizing the feeling of the whole group.

MRS. PIEL: I am sorry. On cross examination counsel asked what they were talking about, and I am asking the same question.

THE COURT: Being agitated is not testimony [88] as to what they talked about.

MRS. PIEL: Exactly. I just want the conversation, your Honor.

THE COURT: Let's try to keep it to that.

A. I don't recall all the details of our conversation.

Q. Whatever you do recall, if you recall anything. A. I remember specifically somebody said, "Well, that was a good morning's work. I'm hungry." And I think a number of the students said "Yes, let's have lunch."

MRS. PIEL: I have no further questions.

MR. LITVACK: Nothing further.

(Witness excused.)

MRS. PIEL: Carolyn Moncure.

CAROLYN MONCURE

called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. PIEL:

Q. Carolyn, you are going to have to speak up because we all have to hear you. [89] A. Yes.

Q. How old are you? A. Seventeen.

Q. Where are you—are you in school now? A. Yes, I am.

Q. Where are you in school? A. I am a freshman at Newcomb College.

Q. A freshman where? A. At Newcomb College.

Q. Where is that? A. It is in New Orleans.

Q. Do you know the plaintiff, Sandra Adickes here? A. Yes, I do.

Q. When did you first meet her? A. I think it was the first day of freedom school which was on July 6, 1964.

Q. Were you living in Hattiesburg that summer? A. Yes, I was.

Q. Do you ordinarily live in Hattiesburg? A. I used to, until I was 11 years old, and after that I would spend the summer up there.

Q. Did you have a relative living there? A. Many of them.

[90] Q. And you were living with one of them the summer of 1964? A. Yes.

Q. With your grandmother? A. Yes.

Q. Were you one of Sandra Adickes' pupils that summer?

A. Yes, I was.

Q. Do you recall what subjects you took with her? A. We had American Negro literature, and we did a bit of writing, and we had discussion groups.

Q. Did the various discussion groups—did there come a time when you ever discussed the Civil Rights Act? A. Yes.

Q. When were your first discussions about that, if you recall? A. I don't think it was too long after school started, and they sort of continued throughout the extent of the period.

Q. And did there come a time when you had a discussion with your friends and fellow students about going to some place that you had not gone to [91] before? A. Yes.

Q. When did that discussion take place? A. Well, I suppose it was around the middle of July, just sitting around talking about things we could do then that we couldn't do before.

Q. Did you decide that you might go to one of those places? A. Yes, we did.

Q. Where did you decide you would go? A. Well, first we decided we would go to a drive-in movie, but we changed our plans because, well, transportation was a problem, but first of all we thought about the danger that was involved of going to a drive-in movie.

Q. Where did you decide to go? A. We also talked about going to the library, and we decided we would go to the library. This was around the first part of August.

Q. And do you recall the first time you had a discussion with your teacher about it, Miss Adickes? A. Well, I would

say that it was at the beginning of the week that we went, either that Monday or that Tuesday.

[92] Q. As a result of that discussion did Miss Adickes say she would go with you? A. It was decided that she would, but just how it was, I don't remember.

Q. And so did there come a time when you went from Palmer's Crossing to Hattiesburg, to the library? A. Yes.

Q. And do you recall what day that was? A. It was on Friday, August 14th.

Q. And what happened? A. We got the 11:30 bus, and we got in town about 12 o'clock, and we walked down to the library, which was about five or six blocks from there, maybe a little bit more or less, and we went in the library where we asked for library cards but were refused, and after waiting some time the chief of police came in and he told us that the library was being closed. So we planned on having lunch after we went to the library so we decided that that it what we would do. So we went down to Woolworth's, which was crowded, and we waited about five minutes, I guess, and we decided we would go somewhere else to have lunch, so we went down to Kress, and there were three of us in one booth and four in the other, [93] and, well, after we waited about 10, 15 minutes, I guess, a waitress came and she went to the booth that had Sandy in it first, and—

Q. Were you in the booth with Sandy? A. No, I was not.

Q. All right, go on. A. —and she gave them menus, and they made up their mind what they were going to order, and she took only three orders, and I heard one of the girls tell her to wait, because Sandy wanted something also. So she told Sandy that she couldn't serve her. And—

Q. Did you hear any more of the conversation? A. Yes.

Q. Will you tell us everything you can remember that you heard? A. Yes. Well, she told Sandy that she couldn't serve her, and Sandy asked why. She said because she had instructions from her manager not to serve the whites that came in with Negroes—with colored people. And so Sandy asked her if she were refusing her service, and she said "Yes."

So Sandy asked her the name of the manager, and she said "Mr. Powell." And Sandy again asked her [94] if she were refusing her service, and she said "Yes."

So then the waitress came over to our booth and asked us what we wanted, and we told her, well, we didn't want anything either, so we all got up and left.

Q. How crowded did the store look when you came in?

A. It wasn't half as crowded as Woolworth's, I would say. There were a couple of—maybe there was one booth empty when we went in, and the booths weren't packed, there were only two or three in either one, and there were a couple of empty stools in the lunch counter, and there weren't too many people in the front of the store, I don't know about the back of the store. The lunch counter runs a good bit into the store, so it wasn't very crowded.

Q. Did you see anybody in the store do anything unusual while you were there? A. No.

Q. Were you looking around? A. Yes.

Q. You are a freshman at Newcomb College, did you [95] say? A. Yes.

Q. What are you studying? A. Chemistry.

MRS. PIEL: You may cross examine.

CROSS EXAMINATION

BY MR. LITVACK:

Q. Miss Moncure, when you came into town on August 14th, am I correct that you were all dressed alike; is that right? A. We had on shirts alike.

Q. And that was something you had all agreed to do prior to the time you came; is that right? A. Yes.

Q. Do you recall any discussion amongst the group as to whether or not that might cause any violence or incite any anger in town? A. Of course not, because they had been worn before.

Q. You had worn them in mixed groups before in town? A. Well, I hadn't.

Q. Oh, you had not? A. Not in a mixed group.

Q. You had never come in with any white person [96] dressed like that, had you? A. No, I hadn't.

Q. On that particular day though you did decide to wear this shirt and blouse that you told us about, along with Miss Adickes; is that right? A. A shirt.

Q. A shirt? A. Yes.

Q. And I think you said you took the bus into town and you got off the bus and you had to walk five or six blocks to the library? A. Yes.

Q. What street is the library on? A. It's on 9th Street, I think.

Q. Do you walk down Main Street from the bus to get to the library? A. Yes, and it sort of curves.

Q. Main Street curves? A. Yes.

Q. How far is the library from the police station? A. I don't know where the police station is.

Q. You don't know where it is? A. No, I don't. Oh, yes, I do.

[97] Q. Is it on Main? A. No, I don't think it is on Main Street. No, it is not on Main Street.

Q. Is there a courthouse on Main Street? A. Yes.

Q. Is that just a little ways away from the library? A. Yes.

Q. And you walked about five or six blocks up to the library on Main Street; is that right? A. Yes.

Q. When you came out of the library you went to Woolworth's, as I understand you; is that right? A. Yes.

Q. I gather as you walked down the street you discussed the incidents at the library; is that correct? A. Naturally.

Q. And you went into the Woolworth's store. How long were you in the store at Woolworth's? A. Only about five minutes, I guess.

Q. What did you do while you were in there? A. Let me see. First of all, when we first went in we sort of waited around the lunch counter, [98] and then we looked at the pets and the goldfish, near the back of the store, and then we left out.

Q. Is the Woolworth store about the same size as the Kress store? A. I think so.

Q. You think it is about the same size? A. Yes.

Q. It is not any smaller, is it? A. I am not sure.

Q. You are not sure of the relative sizes of the stores?

A. Right.

Q. But the Woolworth store, I gather at any rate, was very crowded, wasn't it? A. It was.

Q. I mean not only were people at the lunch counter but people shopping? A. Right. There were many people in there.

Q. Lots of people? A. Yes.

Q. This was between 12 and 1 on Friday? A. Yes.

Q. Some time in there? A. Yes. Closer to 1.

[99] Closer to 1, you would say? A. Yes.

Q. On August 14th, when you made this trip into town, did you know about any prior acts of violence that had occurred in Hattiesburg? A. Well, I read in the newspaper about the one with the rabbi.

Q. You had heard about the rabbi being beaten up? A. Yes.

Q. Had you heard of any others? A. No.

Q. Yet you discussed going to the drive-in and you said there was some danger involved in that; is that correct? A. Yes.

Q. You meant physical danger, didn't you? A. Yes.

Q. And there had been physical incidents in town; isn't that right? A. I am not sure. I told you I read of one with the rabbi.

Q. You just knew of one? A. Yes.

[100] Q. Had you regularly read the newspaper, the Hattiesburg newspaper? A. What was in it, yes.

Q. Would you read it fairly regularly, would you say? A. Yes.

Q. What is the name of the newspaper? A. Hattiesburg American.

Q. Do you recall, Miss Moncure, a statement in the newspaper, an ad taken out in the newspaper by the White Citizens Council condemning Kress & Company for serving Negroes? A. No, I don't.

Q. Do you recall that Kress did in fact prior to August 14th serve Negroes? A. Yes.

Q. You knew that? A. Yes.

Q. And you knew Woolworth did too, didn't you? A. Yes.

Q. In fact, that is one of the reasons you went to Kress?
A. Yes.

[101] Q. Had you ever been in Kress before this time?

A. Yes.

Q. Had you eaten there? A. I had a Coke in there before.

Q. At the lunch counter? A. Yes.

Q. Had you come in alone? A. I doubt it.

Q. Do you recall who you were with? A. No. Maybe one or two other persons.

Q. Were any of them white, do you know? A. No.

Q. You don't know or they weren't? A. No, they were not.

Q. They were other colored people who lived in Hattiesburg? A. Yes.

Q. What is the name of the colored community? A. Of the what?

Q. Of the community. A. Palmer's Crossing.

Q. Had you ever been refused service in the Kress store?

[102] A. I don't remember. I don't think so.

Q. Would you remember if you were refused service at the store? A. I think I would.

Q. And you don't remember any such incident; is that right? A. No, I don't.

Q. Do you recall, Miss Moncure, any publicity being given to the fact Kress did serve Negroes and whites in its facilities? A. No, I don't.

MR. LITVACK: I would like to have this marked for identification as Defendant's Exhibit A, please.

(Defendant's Exhibit A marked for identification.)

BY MR. LITVACK:

Q. I would like to show you Defendant's Exhibit A for identification, Miss Moncure, and ask you, with special reference to this picture over here— A. I have seen this picture before.

Q. You have seen this picture before? A. Yes.

Q. Does that refresh your recollection that [103] there was some publicity concerning this? Is that right? A. Yes.

Q. And that Kress did serve Negroes together with white people at its eating facilities in Hattiesburg; is that right?

A. I only see Negroes.

Q. Do you know this man down here? A. No, I don't.

Q. Do you know any of these people? A. I think I know her (indicating).

Q. Who is it? A. I think it is Lauren Cress.

Q. Is she a Negro? A. Yes.

Q. She is shown sitting at the Kress Hattiesburg facilities; is that right? A. Yes.

Q. By the way, does Kress maintain, to your knowledge, only one set of eating facilities at its store in Hattiesburg?

A. One set?

Q. Yes. A. That is all I have ever seen in there.

[104] Q. As far as you know, they just have one set of facilities, isn't that right, one counter and one set of stools, isn't that right? A. And the booths.

Q. And the booths? A. Yes.

Q. But as far as stools and counter, it is one counter with a series of stools? A. Yes.

Q. And anyone served sits down at the same counter, isn't that right? A. Yes.

Q. Have you ever heard of Reliance Manufacturing Corporation? A. Not much about it.

MRS. PIEL: Your Honor, I object to going beyond the scope of the direct, about Reliance. In fact, a lot of what we are hearing. But I will wait for the appropriate question.

THE COURT: I don't know where we are with Reliance so I can't very well rule.

MR. LITVACK: I am merely asking the witness whether she knew of them.

[105] BY MR. LITVACK:

Q. Is Reliance a manufacturing company in Hattiesburg, Mississippi.

MRS. PIEL: Your Honor, with regard to this line of

questioning, I will object on the basis it certainly goes beyond the scope of the direct, and I don't know the relevance.

MR. LITVACK: Of course this is cross examination, and what I am leading up to is it relates to the testimony the witness gave about the condition of the Kress store later in the day. It is our position it was crowded, and one of the reasons it was crowded was because of Reliance's payday.

THE COURT: I will permit it. This is the company, I take it, that pays off on this day?

MR. LITVACK: That is the payday, yes, sir.

THE COURT: All right. I will take it.

MRS. PIEL: Your Honor, this witness is not an expert with regard to or doesn't know about whether Reliance pays off on that day, and it does go quite beyond the direct.

[106] THE COURT: If she doesn't know, she can say so, and that will be the end of it.

MRS. PIEL: All right, your Honor.

BY MR. LITVACK:

Q. I am sorry, Miss Moncure, I don't recall where we were. Do you know Reliance Manufacturing Corporation?

A. I have heard of it.

Q. Is it a manufacturer located in Hattiesburg, Mississippi?

A. Yes.

Q. Do you happen to know when its payday is? A. No.

Q. Has there ever, to your knowledge, Miss Moncure, been an incident of violence in the Kress Hattiesburg store?

A. No.

Q. Other than the incident in question involving Miss Adickes, do you know of any occasion on which a white person was refused service in Kress' Hattiesburg store? A. No.

Q. Do you know of any occasion in Hattiesburg, Mississippi, Miss Moncure, based on all your time [107] there, wherein a white person was refused service but the Negroes were offered service? Do you know of any other instance where that happened? A. No.

MR. LITVACK: Thank you.

MRS. PIEL: You may step down.

(Witness excused.)

JIMMELA STOKES

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. PIEL:

Q. Jemmela, how old are you? A. I am 18 years old.

Q. Where do you live? A. I live in Hattiesburg, Mississippi.

Q. Where do you go to school? A. I am in school at Bishop College in Dallas, Texas.

Q. What year are you in school? A. Freshman.

Q. What are you studying? A. Sociology.

Q. Did you have occasion to be one of Sandra [108] Adickes' students in the summer of 1964? A. Yes, I was.

Q. When did you first meet her? A. About two days after freedom school had started.

Q. What sort of subjects did you study with Sandra Adickes? A. We read Negro American literature books and discussed them, and we discussed the local government, had discussion on the local government of Hattiesburg, and we did some writing.

Q. Did there come a time when a group of you decided to go to a public facility in Hattiesburg after the passage of the Civil Rights Bill? A. Yes, there did.

Q. When was that? A. Well, we started discussing this—well, we had discussed this all along through school, but we discussed about going about—going to some of the places. First we discussed going to a drive-in movie. This was in July some time, about the latter part of July. And then we discussed going to the public library to try and get cards, and this was about the first or the second [109] week of August.

Q. Had you lived in Hattiesburg all your life? A. Yes, I had.

Q. Had you ever been in the public library before? A. No, I hadn't.

Q. When you had this discussion about going, do you recall how it came up that Sandra Adickes went with you or planned to go with you? A. Well, we had this discussion ourselves, Sandy wasn't present. This was on Friday. And the following Monday or Tuesday we told her about it at school, and I can't remember whether or not we asked her to go or she said she would go or what.

Q. But in any event the expedition was planned? A. Yes.

Q. And tell us what happened on August 14, 1964? A. That day we left Palmer's Crossing at 11:30 and arrived downtown at 12 o'clock. From there we went to the public library, and when we got inside there was a young lady on the telephone, [110] and just as we walked in she hung the telephone up and called another number and said "I need some help down here," and—

MR. LITVACK: I am going to have to object as to what was said at the library.

THE COURT: I suppose we better be consistent and not have the conversations at the library.

MRS. PIEL: I only want the witness to tell what happened. Sometimes it is hard.

THE COURT: I know. Probably it is not too damaging, but let's try just to have what you said, not what somebody said to you.

BY MRS. PIEL:

Q. Can you remember everything you said in the library? A. Yes, I can.

Q. What did you say? You can't tell us what you got back. Just tell us what you said. A. Oh. I said "The White Citizens Council told you not to serve us."

Q. To the librarian? A. Yes.

Q. Did she answer something? [111] A. Yes, she did.

Q. You can't tell us what she answered. A. I know. And then I said—

Q. Was there anything else you said to her? A. I said "If we can't use the library, then I don't think anyone should be able to use it."

Q. And can you remember anything else that you said? A. Yes. I said "We'll stay."

Q. And did you give that answer to somebody who asked you a question, when you said "We'll stay"? A. I can't remember.

Q. Have you told us everything that you can remember that you said in the library? A. In the library, yes, I have.

Q. And then what happened after a while? A. We left the library.

Q. Did somebody come in before you left? A. Yes, Hugh Herring, the chief of police of Hattiesburg.

Q. He came in, and did he say anything to you? A. No, he didn't say anything to me.

[112] Q. Did he say something in general? A. Yes, he did.

Q. After he said something in general, what did you do? A. We left the library.

Q. Where did you go? A. We went down to the Woolworth store.

Q. How long did you stay in Woolworth's? A. Not very long, because we were going to get something to eat and it was crowded in there.

Q. And what did you do after that? A. After we left the Woolworth store?

Q. Yes. A. We went to the Kress.

Q. And now you can tell us everything that happened after you got to Kress. A. We went in and we sat down, that was Sandy, Lavon Reed, Diana Moncur and myself, and the lady, the waitress, after being there for about 15 minutes the waitress came over and asked to take our orders, and she took all the orders except Sandy's, and I said, "Hey, you forgot one."

Q. Had she left the booth when you said this to her?

[113] A. Yes, she had. Well, she was on her way.

Q. She didn't say anything to Sandy, is that it? A. Not as far as taking orders, no.

Q. And so then what did you say? A. Then I said "Hey, you forgot one," and she said—do you want to know what she said?

Q. Yes, now you can tell us the conversation. A. She

said "We are allowed to serve the colored but not the whites who come in with them."

Q. And what else was said? A. And then Sandy asked her was she refusing her service. Well, before that the lady had said they didn't serve integrated groups too.

Q. They— A. They didn't serve integrated groups. After she said about "We can serve the colored but not the whites who come in with them," and Sandy asked was she refusing her service, and she said she was following the manager's orders, because the manager had told her not to serve the whites who came in with the Negroes. And Sandy asked her the manager's name and she said "Mr. Powell."

Q. And then what happened? [114] A. And then we left out of this store. After we left the store, and just as we were—

MR. LITVACK: I object, your Honor, as to what happened after they left the store.

THE COURT: Yes. I think we are limited to the issues.

MRS. PIEL: Right.

BY MRS. PIEL:

Q. How many people did you see in the store? Do you recall that it was crowded? A. No, it wasn't crowded because I have been here several times and I have seen much more people there. I didn't know the exact number.

Q. There were a number of people there? A. Yes.

[115] Q. Did you see anyone do anything out of the ordinary among the people who were in the store? A. No, I didn't. They stared at us a little and walked on.

Q. They stared at you and walked on? A. Yes.

MRS. PIEL: You may cross-examine.

CROSS EXAMINATION

BY MR. LITVACK:

Q. Miss Stokes, had you prior to August 14th ever been in the Kress Hattiesburg store before? A. Yes.

Q. Had you ever eaten there? A. Yes, I had.

Q. Had you ever been with anyone else when you ate there? A. Yes, I had.

Q. Other friends of yours, correct? A. That's right.

Q. Had you ever been refused service there? A. No. All of my friends were Negro and I was not with an integrated group at the time I ate there.

Q. None of the Negroes were refused service? A. No.

[116] Q. Do you know of any occasions when any Negroes were refused service in a Kress store? A. No, I do not. After July I do not.

Q. As far as you know, on every occasion they were served? A. Yes.

Q. That was certainly true with regard to you? A. Yes.

Q. Am I correct that Kress has, again, one set of eating facilities, one counter? A. That's true.

Q. When you ate there did you sit at the counter? A. Yes.

Q. How many times had you been there before August 14th? A. I can't remember. Not too many times. I had just started to go there in July.

Q. How many times had you been there? A. I don't know.

Q. On those occasions at which you sat at the counter were there other people at the counter? A. Yes, there were.

Q. Seated at the counter? [117] A. Yes.

Q. Were some of those people white? A. Yes. Most of the times they would get up and move.

Q. The white people would? A. Yes.

Q. But Kress served you? A. Yes.

Q. And the white people sitting at the counter, too? A. Yes. I guess that's so.

Q. Were you aware on August 14, 1964 that there had been acts of violence in Hattiesburg? A. Yes.

Q. You knew that people had been beaten up, didn't you? A. Yes.

Q. You had known that white civil rights workers had been attacked and beaten up? A. Yes.

Q. Did you also know a large part of this was directed towards the white civil rights workers in town in the company of Negroes? A. Yes.

{118} Q. You knew that on August 14th, is that right?
A. Yes.

Q. When the waitress came over to you, how long were you sitting there by that time? A. Ten or fifteen minutes.

Q. Just sitting there talking? A. Yes.

Q. And people were in the store just going about their business? A. Yes.

Q. No one said anything to you, is that right? A. That's right.

Q. Were you surprised that no one paid any particular attention to you? A. No, I was not. Well, I had been there before and I had been also—also I had been with whites, not in Kress but around Hattiesburg, and they had not said anything.

Q. Nothing had been said in other places either? A. To me, no.

Q. Within your experience, nothing had been said in Hattiesburg? [119] A. No.

Q. You didn't expect any incident or violence? A. No, I didn't.

Q. Because in your experience in Hattiesburg this had never happened? A. Not with me.

Q. Within your personal experience? A. That's right.

Q. While still inside the store, did you observe any people out on the sidewalks? A. There are always people there but not unusual—there were people.

Q. Did you observe any people out on the sidewalk? A. Yes. They were walking and going about their business.

Q. You didn't see anyone standing out there? A. You mean standing—

Q. Standing and looking in the store? A. Looking at us, you mean?

Q. Yes. A. No, I didn't.

Q. Did you notice anyone in the store pointing at you or looking at you? [120] A. No, I didn't.

Q. On your way down from the library and Woolworth store did you notice any police about? A. Yes.

Q. You did notice police about? A. Yes.

Q. Were any of the police following you? A. If so, I don't remember.

Q. You just noticed them around; is that right? A. Yes.

Q. Had you ever been in a group with a white person and Negroes wherein the Negroes were offered service and the white person was refused service prior to August 14th?

A. No, I had not.

Q. Do you know of any other occasion prior to August 14th where that had ever happened; in Hattiesburg, of course?

A. I can't remember.

Q. You don't know of any such occasion? A. I can't remember. If so, I can't remember.

Q. To the best of your recollection, you are not aware of it; is that right? A. That's right.

[121] MR. LITVACK: Thank you.

REDIRECT EXAMINATION

BY MRS. PIEL:

Q. Jimmela, you said you had been in Kress' before and you had been waited on. Was there any difference in the way you were waited on and the way the white people were waited on? A. Yes, there was.

MR. LITVACK: Objection. I don't understand the relevance of that.

THE COURT: Yes. I will sustain that.

Q. Did you have to wait a good while for service? A. Yes.

MR. LITVACK: Objection, your Honor. We are not trying Kress' service.

MRS. PIEL: Your Honor, the point is that she was not treated nicely in Kress' before this incident. I just want to bring out one fact and that is whenever she went in there she had to wait an hour or half an hour for service.

THE COURT: She said she waited ten or fifteen minutes.

MRS. PIEL: I am talking about the prior occasions. We went into those on cross-examination.

[122] THE COURT: I guess she got better service this time.

MRS. PIEL: She did. It is relevant with regard to the attitude of Kress. As I understand it, we are developing the fact that Kress would welcome Negroes.

MR. LITVACK: Kress served Negroes. That's what we are developing.

MRS. PIEL: Then it becomes important as to how they were served, whether they were served quickly or reluctantly.

THE COURT: That may be true if we had another case but the case here involves a white lady who was not served, not some colored ladies who were not given faster service.

MRS. PIEL: May I, for the record, then ask the question?

THE COURT: You can. The jury is instructed it is irrelevant but you can ask it.

Q. On these prior occasions or on any prior occasion do you recall having to wait as long as an hour or half an hour to be served? A. Yes.

MR. LITVACK: I object to the question and [123] move that the answer be stricken.

Q. Did you notice on those occasions that white people in the store at the same time were served quicker? A. Yes.

THE COURT: The jury is instructed that this is entirely irrelevant to the issues in this case. I don't think that Kress' defense is as to the time it took to serve these people. There is no complaint made that the colored students were not served, that this person didn't take their orders expeditiously. The testimony is that she came and took their order within ten or fifteen minutes.

MRS. PIEL: On this occasion.

THE COURT: The store was either crowded or it was not crowded. You know, in these other instances you talked about the store might have been short-handed, there might have been a terrific crowd there, there could have been any other thing. The defense cannot be prepared to answer all of these questions about what was the service like the week before or two weeks before.

MRS. PIEL: This only went to the discriminatory aspect, your Honor. [124] I have no further questions.

THE COURT: That is not the discrimination you charge here.

MRS. PIEL: It is hard to parse all the different discriminations one finds in the South.

THE COURT: It is easy to say in a complaint who was discriminated against and it is not in this complaint that these colored girls were discriminated against.

MRS. PIEL: I have no further questions. You may step down.

(Witness excused.)

DIANNE MONCURE

called as a witness by the plaintiff, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. PIEL:

Q. Dianne, how old are you? A. I am sixteen.

Q. Where do you live? A. I live in Los Angeles, California.

Q. Do you go to school there? A. Yes, I do.

Q. Where are you at school in Los Angeles? A. I attend the John C. Freemont Senior High [125] School.

Q. Is that a public school? A. Yes, it is.

Q. Did you have occasion to meet Sandra Adickes, the plaintiff in this case? A. Yes, I did.

Q. When did you meet her? A. I met her in Freedom School in Hattiesburg, Mississippi.

Q. When was this? A. At the beginning of the Freedom School, July 6, 1964.

Q. Was she your teacher there in the Freedom School from time to time? A. Yes, she was.

Q. Did there come a time when you and your friends had a conversation about the Civil Rights Act? A. Yes, we did.

Q. Did you have a conversation about going to some place you had never gone to before? A. Yes.

Q. Did there come a time when you decided to go to the Hattiesburg library? [126] A. Yes.

Q. When was that occasion that you had the discussion?
A. In July sometime, about the middle or last part of July.

Q. Do you recall how it was that your teacher went with you on the occasion or decided she would go with you? A. No, I don't. I just remember that we were discussing it. I don't know how it came about.

Q. Then you decided to go on the 14th of August? A. Yes, we did.

Q. Would you tell us then what happened? A. Well, Freedom School ended at 11:30 that day so we caught the 11:30 bus and we got into town at 12:00 o'clock and we walked down the main street to the public library. All of us entered into the library and they had this young librarian girl talking on the telephone.

Q. You can't say anything that anybody said to you in the library. Remember and tell us anything that you said. A. Okay. So we entered the library and, well, [127] I can't say anything that anybody else said?

Q. No, but you can say "Somebody said something to me and I said"—and whatever you said you can tell us. A. The librarian made a statement and I asked a question "Why," and then she said something else, so the conversation went back and forth.

Q. What did you say? Can you remember anything that you said in the conversation that went back and forth? A. Not in the same words but, well, no, I can't recall all the words, but I know then we decided to sit down at a table. Then I said—all of us were talking, so then I said I wanted to get some water. I said, "Well, I guess I'll go get up and contaminate the water." So I got a drink of water and came back and sat down. After I got the drink of water I went back to the table and sat down. We got up and got some magazines and we looked at the magazines and we replaced the magazines back where they were.

So then, after a while, this police officer came in. I think it was the chief but I know he was [128] a police officer. Then he said something and everybody in the library, the group and the other people—they had a couple of more people in the library—we got up and we left out. We decided to go to Woolworth's and eat lunch so we walked down to

Woolworth's. We went in little groups, twos and threes, walking and talking and discussing what had happened. We went to Woolworth's and we saw how crowded it was so we went to the back and we looked at the pets and goldfish and all that, and got some more water, and we were just trying to kill time to see if they would have more booths open. They didn't, so we went down to Kress.

We walked in and saw two booths together and Sandy—

Q. You mean they were empty? A. Yes. Sandy, Jimella and myself sat in the other booth and one of the other girls—sat in one booth and the other group sat in the booth next to us; so the waitress came over after we had to wait for a period of time, about ten minutes, maybe more, and so that's when she came over and took everybody's order in that booth except Sandy's. She was called back and she was told she didn't take Sandy's order. [129] She said she was not going to take it. She said that the manager told her that they had to serve the colored people but not to serve the whites in mixed groups. That's when Sandy asked her the name of the manager and she told her it was Mr. Powell.

*Then Sandy asked the waitress was she going to take the order, and she said "No" and then she said—Sandy asked the waitress does she know that was a violation against the civil rights law? And the waitress said "Yes," but she would not take the order, and she went to the next booth and the kids in that group said that is she was not going to serve Sandy they didn't want anything, so we all agreed on that and that's when we got up and left.

Q. How many people did you see in the Kress store on that occasion? A. There was quite a few but it was not really crowded.

Q. Did you see anything unusual with regard to any of the people? A. Except that some maybe when they passed the booth, they turned around and glanced. That's all. They didn't stand up and stare.

MRS. PIEL: You may cross-examine.

[130] CROSS EXAMINATION

BY MR. LITVACK:

Q. Miss Moncure, the other Miss Moncure who testified, was that your sister? A. Yes.

Q. You told us about the incident in the library and what you said and what you saw. As far as you know, did anyone at Kress even know about the incident at the library or that you were even there? A. No.

Q. To the best of your knowledge, no one even knew about it? A. Except the people who saw us go into the library.

Q. As far as you know, nobody from Kress saw you go into the library? A. Unless they stood on the street and saw us go into the library.

Q. How many blocks is the library from Kress? A. Maybe about six, maybe more or less, either way.

Q. At any rate, Kress is not across the street from the library, within a block of it? A. No.

Q. It is a ways down Main Street? [131] A. Yes.

Q. Kress is on Main Street? A. Yes.

Q. And the library is on Main Street? A. Yes, it is.

Q. Had you ever been to Kress before August 14th? A. Yes.

Q. Had you eaten there? A. I don't recall eating. Maybe I got a drink there but I don't recall eating.

Q. You mean you bought a drink there? A. Paid for a soft drink.

Q. Did you sit at the counter on that occasion? A. Yes.

Q. I assume you were served? A. Yes, I was.

Q. Were there other people at the counter at that time? A. Yes.

Q. Some of them white? A. Yes.

Q. They, too, were being served, as far as you observed? [132] A. Yes.

Q. Am I correct, Miss Moncure, that before you went to library you had considered going to a drive-in theater? A. Yes.

Q. Am I further correct that the reason you didn't go

in there was that you were concerned about violence? A. That's right.

Q. Is that because you knew there had been violence in town generally? A. Well, only about the incident about the rabbi.

Q. You knew about that? A. Yes.

Q. You thought there might be others? A. Yes, if we went to the drive-in.

Q. Was the rabbi beaten up at the drive-in? A. No.

Q. You told us the fact that you came into the store on August 14th and sat down at the booth and you told us about the waitress talking to you. I think you said the waitress said she didn't serve mixed booths? [133] A. She said that, yes.

Q. What did she say? A. She said the manager told all of them that worked behind the counter for them to serve the colored people but not to serve the whites in the mixed group.

Q. She said that the manager told that to all the people who worked behind the counter? A. That served people.

Q. Yes, I understand. I want to make sure what she told you: The people behind the counter were to serve colored people but not mixed groups? A. That's right.

Q. She took your order? A. Yes.

Q. And the orders of the other Negroes with you? A. That's right.

Q. Did Miss Adickes ask her if she knew if this violated the Civil Rights Act? A. That's right.

Q. What did the waitress say? A. I am not sure but I think she said, "Yes."

Q. Could she have said, "I don't know about that but I am only acting under instructions"? [134] A. I said I think. I am not sure.

Q. You are not sure? A. No.

Q. Do you know of any instance other than the one we are talking about wherein a white person was refused service in Hattiesburg where the Negroes with her were served? A. I don't know of any such occasion.

MR. LITYACK: I have no further questions.

REDIRECT EXAMINATION

BY MRS. PIEL:

Q. Do you recall seeing a police officer come into the Kress store while you were there? A. Yes.

MR. LITVACK: Objection. That's totally irrelevant.

THE COURT: I will take all testimony up to the time they leave the restaurant.

MR. LITVACK: All right.

Q. Had you seen this police officer before that day? A. I can't remember that but I do know a policeman did come into Kress.

Q. While you were waiting for your order? A. Yes.

[135] Q. What did you see him do? A. Well, for awhile he stood up there and looked and then he walked to the back of the store, just browsed around, but he did look at us.

Q. Then what did he do? A. I am not sure after that. Really, I am not sure after that. I do remember he was standing up there looking at us and walking to the back of the store. I think he went back out. I am not sure.

Q. You didn't see him talk to anyone in the store, did you? A. No. After he left—after he stopped looking at us I didn't pay any more attention to him.

MRS. PIEL: That's all.

RE CROSS EXAMINATION

BY MR. LITVACK:

Q. You were sitting in the booth with Miss Adickes? A. Yes.

Q. In which direction were you facing? A. I was facing the back of the store. My face was to the back.

Q. Were you on the same side of the booth as Miss Adickes? A. No, I was across from her.

[136] Q. She, I thought, was facing the back of the store. A. My face was looking—

Q. Looking at the front of the store? A. No, you are wrong.

Q. Let's get it straight. A. My face was to the back of the store. I mean, I could see that. I think that it was.

THE COURT: You were looking towards the back of the store?

THE WITNESS: Yes. Really, I think that's the way it was. It's been a good while ago.

Q. The policeman came in from the back? A. No, he didn't.

Q. He came in from behind you? A. He came in from the front. Anyway, I know I was across from Miss Adickes.

Q. I would like to know which way it was. Your back was to the front of the store; is that right? A. That's right.

Q. He came in the front of the store? A. I still could see him.

Q. You saw him come in the store? [137] A. I still could see him because my back was not complete. We were all together.

Q. You were turned partially? A. Yes. I am telling you, if I was facing that way, but I'm not sure. I know I saw him come in.

Q. Did you say anything to anyone at the table at that time, "Oh, there's a police officer"? A. I am sure they all saw him.

Q. Did you say anything about it? Do you recall? A. I might have.

Q. Do you recall? A. No, I don't.

Q. You say you saw the police officer come in, walk to the back, and that's all you saw? A. I saw him look at us.

Q. You saw him look, yes? A. Yes.

Q. While you were turned looking towards the front of the store and the police officer, did you see any people out on the sidewalk in the street? A. Yes.

Q. Were they looking in the window? A. No, I don't think so. They were going [137a] about minding their own business.

Q. You didn't see anybody looking in as the policeman came in? A. No, I didn't.

MR. LITVACK: No further questions.

THE COURT: We will take a short recess.

(Recess.)

[138] (Jury not present.)

MRS. PIEL: Your Honor, at this time I wish to make my offer of proof. I know your Honor has already ruled with regard to the additional witnesses.

THE COURT: I thought that would be very helpful for the record, yes.

MRS. PIEL: I would be able to produce as my next witnesses two witnesses who would testify as to the custom and usage in Hattiesburg.

THE COURT: What would they testify to?

MRS. PIEL: I don't think they would testify to anything more than we have already in the record, but they would testify it was the custom to discriminate—

THE COURT: You are saying that they would testify to the end result. In other words, they would have to base it on something. If you are prepared to say that their testimony would be no different than what these school children have given or what is already in the record, all right.

MRS. PIEL: I can't say that. I think they have a greater scope of knowledge and a greater scope of understanding.

[139] THE COURT: Would these witnesses testify to specific instances in Hattiesburg subsequent to July 1st up till the 14th of August where a group of colored people accompanied by a white person was given service in a facility similar to Kress, but that service was refused to the white person?

MRS. PIEL: I don't believe they would testify to that, but, you see—

THE COURT: On what would they base their opinion that there was a custom and usage in cases where colored people were accompanied by one or more white people—let's limit it to one, since that is the case we have before us—that they would serve the colored people but they would not serve the white person? If there had been no instances upon which they could say "It happened any number of times, in such-and-such a restaurant this happened," or "In such-and-such a cafeteria this happened on such-and-such a date, a group of colored people accompanied by a white

person went in there and asked to order and they said 'No. We will serve the colored people but we won't serve the white people'"—now, [140] how many instances could they testify to, or could they testify to any?

MRS. PIEL: I doubt if they could testify to any, although I am not sure about that. This bothers me, your Honor, because I wish at least a chance to present my position with regard to this policy.

THE COURT: Surely.

MRS. PIEL: That may be the spotted dog, that may be the situation that took place here, but the custom and usage that this conduct sprang from was the custom and usage against the mixing, the integration of the races, and that this was one way of expressing it. In other words, this was one way of expressing the custom and usage in Mississippi against Negroes using public facilities with white persons, to say "Well, all right, we will serve the Negro, but we won't serve the white person." If you look at Exhibit A—

THE COURT: Had that ever happened before? You say this was one method of expressing it.

MRS. PIEL: Evidently it happened often enough so that the Legislature in 1954, or whenever it passed this resolution which is part of my trial [141] memorandum—

THE COURT: But that dealt with integration in the schools.

MRS. PIEL: It is talking about a custom.

THE COURT: If you can find a cafeteria or a restaurant or anything else mentioned in that particular document—

MRS. PIEL: Well, it talks against the mixing or integration of white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state. I say that the Kress lunch counter, broadly construed, was a public place of assembly, or it was a public place of recreation.

THE COURT: All I am trying to find out, really—I know what your argument is, and I am not saying it doesn't have validity—all I am concerned with at the moment is what would your witnesses testify to. Would they merely testify

to the fact that there was hostility between the colored people and the white people in the South? I think nobody is going to dispute that. I don't know as it [142] requires an expert to testify.

MRS. PIEL: Of course, one of the things that the civil rights program of 1964 really brought to the fore was not so much the South's anger at the Negro, they were much angrier at the white people who were in their opinion agitating the Negroes, so that the custom or the usage, or whatever the feeling was as of that summer, it was directed really against the white people more intensely than the Negro.

THE COURT: What you are telling me is what your witnesses would testify to?

MRS. PIEL: I am sure that they would have additional facts, I mean additional incidents, on which to base their opinion.

THE COURT: You really don't know what they were going to testify to?

MRS. PIEL: That is true, your Honor. I haven't had an opportunity to talk to them at length. I have never laid eyes on either one of them.

THE COURT: In other words, so far as you know they couldn't testify to specific instances in Mississippi similar to this particular instance?

MRS. PIEL: Not similar, not if you [143] say one where Negroes are told that they can be served and the white person no. But to show hostility of the white person-mixing with the Negro, which is after all the real violation of the. Because what is the custom? The custom is that Negroes should not be mixed with white people. They are not mixing quite as much if they come into a public place and order as if they come in with a white person. I think these are principles involved in custom and usage. I don't think custom and usage can be narrowly confined.

THE COURT: You happen to be bringing suit against a company which apparently was one of the more liberal concerns in the neighborhood. Let's forget philosophy and see whether you are going to bring in witnesses who would pin liability on this company.

MRS. PIEL: Of course, this is what the lawsuit is about, as your Honor has pointed out.

THE COURT: We may all abhor, as we do, the situation that existed and that still does exist, but we are dealing with a particular set of facts, and the law happens to be that in order to recover certain things have to be proved.

[194] MRS. PIEL: Custom and usage.

THE COURT: Custom and usage, and a particular custom and usage. Now, you may be able to prove an atmosphere, but proving an atmosphere is not proving a custom and usage.

MRS. PIEL: When you say this to me I feel I have not made my—

THE COURT: A feeling of hostility may exist, but you are trying to take what so far as I know is an isolated manifestation of that hostility in a particular form and convert it into a custom and usage. Now, custom and usage may develop out of various generalities, such as an atmosphere of hate or dislike between people, and you don't get a custom and usage from one instance.

You are trying to convert what is an unfortunate situation in to the nub of a lawsuit against a party that was just as aware, it seems to me, of the problem. Certainly it hasn't been disputed so far that they were one of the establishments in the community that were, maybe begrudgingly, but trying to comply with the law.

[145] MRS. PIEL: I say on this day, August 14th, they weren't, and I refer again to the language "the mixing or integration." That is the custom that Mississippi had that we are talking about, the policy toward the mixing. Now, it is larger than talking about this instance. It is the policy against the mixing of races. And one of its expressions on this day was refusing to serve a white person in the company of Negroes.

THE COURT: I think I know what your people would have testified to, and I assume that they would testify along the lines that you have suggested.

MRS. PIEL: Yes, your Honor.

MR. LITVACK: Your Honor, I understand plaintiff is about to rest, and the jury having been discharged for the day, the plaintiff is going to rest the first thing tomorrow morning. We at that time, your Honor, would like to move with respect to this case and seek a directed verdict. If your Honor please, this is not, obviously, on our part a pro forma motion. We intend [146] to submit papers, and we would like the opportunity, if your Honor would hear us, to briefly, at least as briefly as we can, argue that point to you tomorrow morning.

THE COURT: I would normally, since the jury is coming back at 10:30, hear you at 10 o'clock, but unfortunately I have a conference on another case at 10 o'clock which I hope will only occupy a half hour. I can't very well get hold of these attorneys now and make it 9:30. So I will hear you at 10:30, and the jury will just have to stand by.

MR. LITVACK: Thank you.

MRS. PIEL: I do have some cases now, or at least a case and a little bit of argument, on the business of the motion to produce financial data pursuant to the claim for punitive damages. Would now be the proper time, or would you want to hear it at some other time?

MR. LITVACK: I am prepared, your Honor, if it suits your convenience.

THE COURT: I have things to do, but I will be glad to listen to you.

MRS. PIEL: We know that it is the [147] general rule—and I think your Honor was talking about that this morning—that except when a position of wealth is necessarily involved in determining damages the admission of evidence concerning the wealth of a party constitutes error if you don't admit it. However, the exception to the rule is in the area of where punitive damages are demanded. There is mention of this, but there is not a clear holding in this regard, in a case called Ford Motor Credit Company against Hill, which is a 1965 case arising in a federal court in Missouri, and the citation is 245 F. Supp. 796.

However, one can go to corpus juris and one sees there that theory that you can go into the financial situation of

the defendant, and we hear there the reasons for the rule, which are: the primary purpose of evidence as to financial condition of the defendant is to ascertain his ability to respond to exemplary damages and, two, in order that the punishment might not be excessive on the one hand nor inadequate on the other evidentiary knowledge of the financial ability of the wrongdoer to pay is an essential. *Corpus juris* says this, and it cites a case which I did [148] not think supported the theory very well. I know there is a logic to it. However, there is one case in New York that supports us, and I am coming down to the nub, really, of my argument. It is in Onondaga County Supreme Court, 295 NY Supp. 705, decided in 1937. It is *Klauber against SKE Operating Company*. The court there said that "When a case is made that will authorize the award of exemplary damages defendant's financial condition is a material consideration in fixing the amount." It cites New York Law of Damages, Vol. 1, which I didn't go to look at, but there is this one case that says it is proper.

THE COURT: Do you think the jury needs edification on the financial worth of Kress?

MRS. PIEL: I think it might be helpful if we had one figure. I don't know that I need all the figures that I have required, but I think we need a figure as to either its—

THE COURT: What do you think of the argument that your damages should be limited to the amount of any fine that could be imposed?

MRS. PIEL: There isn't any fine that [149] could be imposed under the section of the law. Interestingly enough, I moved at one point on a very way-out theory that the civil rights law that was declared unconstitutional in the civil rights cases had been reinstated by the *Heart of Atlanta* and *Katzenbach* cases. Had I come in with that—

THE COURT: You didn't appeal from those decisions of Judge Bonsal?

MRS. PIEL: No, I didn't. In fact, I don't think it is a final order, so I think there might have been some difficulty. I got caught on that once. But in any event there is no fine

limitation, so I don't think there is that limitation. Anyway, this case is about exemplary punitive damages.

THE COURT: All right.

MR. LITVACK: Your Honor, if I may address myself briefly to the question of the admissibility of our net worth on the issue of damages, I understand Mrs. Piel to admit the general rule is that such testimony is not admissible, but she says there is a 1937 New York case, which I am not familiar with. Except to say this, your Honor: We have [150] here three cases, the first one I will cite to your Honor is Walrus Manufacturing against Excel Metal Cabinet Company, Western District of New York, a federal case, 1957, in which Judge Morgan says at page 842, 161 F. Supp. 840-842, *in a case where the plaintiff is seeking punitive damages*:

"Testimony regarding defendant's financial status and ability is not admissible in New York."

He cites two other cases, both of which hold the same. One is Wilson vs. Onondaga Radio Broadcast Corp., 23 Supp. 2d 654. It is a 1940 case, subsequent to the 1937 case Mrs. Piel cited, which was a civil rights case, interestingly enough, your Honor, under the New York Act. The judge there said:

"To measure punitive or exemplary damages by the wealth of the defendant seems farfetched,"

and held inadmissible any such testimony.

Likewise, there is another New York case, Stewart vs. Mutual Closing, 91 NY Supp. 2d 338, a 1949 case. Briefly, those are the three we have come [151] up with. They all agree.

THE COURT: I will look the cases up. It sounded like a rather novel theory to me at the time. I can see in maybe a very rare case it might have some application.

MR. LITVACK: Of course, as your Honor mentioned just briefly, it is our position punitive damages, the amount of punitive damages which can be assessed, even if this were admissible, which it is not, would have to be taken in connection with the maximum fine that could be assessed against us.

THE COURT: Is there a maximum fine provided?

MR. LITVACK: Our position on that is this, your Honor. Under Title 18, Section 242, which is the criminal counterpart to Section 1983, the same language as the criminal counterpart, the maximum fine which can be imposed is \$1,000. Our argument is where the Congress has provided a maximum penalty which can be imposed for a certain activity where a defendant is found guilty beyond a reasonable doubt and with all the judicial and constitutional safeguards to which it would be entitled in a criminal [152] trial, that the Court is bound not to have and cannot permit a higher award in a civil case where we don't have the same constitutional safeguards here the Congress has already set the maximum penalty because to do likewise we say would be to violate in fact our constitutional rights. You have a right not to be assessed any more in a civil case than you could be in a criminal.

THE COURT: Very well, I will look at these cases and rule in the morning. But as I say it is a somewhat novel approach, and furthermore I think that it is generally known that Kress is not a bankrupt organization.

MR. LITVACK: Thank goodness that is correct, your Honor.

THE COURT: I will rule in the morning.
(Adjourned to Wednesday, February 15, 1967, at 10:30 a.m.)

[154] SANDRA ADICKES, recalled

FURTHER DIRECT EXAMINATION

BY MRS. PIEL:

Q. As a result of your experience in Mississippi, your research and study, and the experiences that you have already testified to, are you familiar with the policy in Mississippi among the white community as to the mixing of the races, the Negro and the white? A. Yes, I am.

MR. LITVACK: Objection, your Honor.

THE COURT: Sustained.

Q. Are you familiar with the custom and usage in Mississippi with regard to the attitude toward [155] white persons who associated with Negroes?

MR. LITVACK: Objection, your Honor.

THE COURT: I don't see the relevancy. Assuming that there was that, we still have the question of this instance.

MRS. PIEL: The custom and usage with regard to this particular instance.

MR. LITVACK: Your Honor—

THE COURT: I will receive it over your objection. You have my ruling already on its relevancy, but let's make it part of the record.

A. Yes, I am.

Q. What is that?

THE COURT: I am not passing on her qualifications, either.

MRS. PIEL: I understand.

THE COURT: In view of what she has testified to as to the very short period of time she spent in the area.

MRS. PIEL: Doesn't that go to the weight, your Honor?

THE COURT: No, it goes to more than that, but as I say I am permitting the questions to be asked.

[156] Q. And what is that policy?

MR. LITVACK: Objection, your Honor. There has been no foundation laid, and it is totally irrelevant as well.

THE COURT: I agree, but I will permit the question. Let's have it in the record with the subsequent ruling.

MR. LITVACK: I would just like my objection noted.

A. The policy is opposition to the mixing of races in Mississippi.

Q. And my question, I believe, was also as to the attitude of the community toward white persons who mix with Negroes? A. The attitude is a hostile one.

MR. LITVACK: Objection, your Honor.

THE COURT: Yes. Overruled.

Q. I am sorry, I didn't hear your answer. A. The attitude is a hostile one.

Q. I want the custom and usage.

MR. LITVACK: I object, and move to strike the answer.

THE COURT: I will strike the answer.

Q. Have you had occasion in your own [157] experience to observe frequent expressions of this hostility that you describe? A. Yes, I have.

MR. LITVACK: May I have a continuing objection, your Honor. Otherwise, I would have to keep interrupting.

THE COURT: Yes.

Q. Did you observe that hostility on one occasion or on many occasions? A. On many occasions.

Q. And you personally observed it as far as your own association with Negroes, is that correct? A. Yes. I observed and experienced it.

Q. And did you observe it on numerous occasions? A. Yes, I did.

MRS. PIEL: I have no further questions.

THE COURT: I don't think you need to cross-examine.

MR. LITVACK: No questions then, your Honor.

(Witness excused)

[158] CAROLYN MONCURE, recalled

FURTHER DIRECT EXAMINATION

BY MRS. PIEL:

Q. Miss Moncure, you have already been sworn. A. Yes.

Q. On this particular day in question, the 14th of August, 1964, when you were in the Kress store waiting for service, or at any time while you were in the Kress store, did you observe a policeman coming in? A. Yes, I did.

Q. When did you observe that policeman? A. It was about five minutes after we had been in there.

Q. And what did you see? A. Well, he came in the store, my face was facing the front of the store, and he came in the store and he passed, and he stopped right at the end of our booth, and he stood up and he looked around and he smiled, and he went to the back of the store, he came right back and he left out.

MRS. PIEL: I have no further questions.

FURTHER CROSS EXAMINATION

BY MR. LITVACK:

Q. Have you told us everything now, Miss Moncure, you have observed about the policeman? [159] A. Yes.

Q. He came into the store, looked at you, smiled and walked out? A. Went to the back.

Q. Went to the back, and walked out? A. Yes.

MR. LITVACK: Thank you. No further questions.

(Witness excused)

MRS. PIEL: At this time the plaintiff rests.

THE COURT: Are there any outstanding matters or offers of evidence before the plaintiff rests?

MRS. PIEL: Yes, your Honor. I thought I had made that off on the record yesterday, and I make it today. I have Mr. Gordon available to come to testify as to—

THE COURT: You indicated the nature of his testimony yesterday.

MRS. PIEL: He would further testify—

THE COURT: I will object to any statement in the presence of the jury. I will excuse the jury. We will take a short recess.

(Jury excused)

MRS. PIEL: To go on with Mr. Gordon's testimony, if you will recall when I was speaking to the Court yesterday I advised the Court I was not too clear exactly what Mr. Gordon would say. He is a research fellow in social psychology at the Rockefeller University. He would testify that he was there through the summer of 1964 and 1965, and that—

THE COURT: 1965 doesn't have any bearing.

MRS. PIEL: I realize that. That he is familiar with the custom with specific regard toward the treatment of whites in the company of Negroes, and that, further, of his own personal knowledge he knows of at least one other instance, if not more, where the same kind of discrimination involved in this case took place, to wit—

THE COURT: When did that take place?

MRS. PIEL: Prior to August 14th and after July 2, 1964.

THE COURT: Just one other incident?

MRS. PIEL: One other incident which he personally knows of, and other incidents which he is familiar with.

[161] THE COURT: Which he observed himself.

MRS. PIEL: One actually happened to him, and I believe that he knows of others.

THE COURT: And where did this happen?

MRS. PIEL: In Hattiesburg.

THE COURT: In what establishment?

MRS. PIEL: At the Rebel Theatre.

THE COURT: That is not an eating place?

MRS. PIEL: No, but it is a similar kind of discrimination supporting the custom and usage in Mississippi with regard to the service of a person, a white person, in the company of Negroes. In this instance, the Negroes who were with him were all let into the theatre and he was excluded.

THE COURT: Of course, we have had the ruling this witness was developed too late in the game anyhow, but I fail to see how one other instance establishes a custom and usage.

MRS. PIEL: He would also testify with regard to his own experience that he had heard of and was familiar with other incidents.

THE COURT: You are familiar with the hearsay rule, I understand.

MRS. PIEL: However, that is an exception [162] with regard to an expert because an expert is an expert as a result not only of his own experiences but of what he has read and what he knows about and what he has heard from others.

MR. LITVACK: I have yet to hear anything which convinces me this man is an expert in anything. I gather he spent a summer down there, three or four weeks probably before this incident occurred, and that would seem, according to Mrs. Piel, to be the basis of his expertise. I don't think he could even be qualified based on what I have heard as an expert. More important, as your Honor has pointed out, this witness was developed not at the eleventh hour

but rather at the twelfth hour, and indeed at the thirteenth hour because Mrs. Piel has found out since the trial started what he would testify to. I don't see how I could cope with the situation. Moreover, one incident, even if it did happen, wouldn't tend to prove a custom, and secondly it is an incident which happened at a movie theatre, not an eating facility such as Kress. It wouldn't seem to me to have any particular bearing and certainly wouldn't be the kind of numerous, sufficient kind of [163] incident to carry the burden of proving a custom in this case.

THE COURT: You have my initial ruling which I adhere to. I don't think anybody questions what you say about the antipathy that existed and probably still exists today, and nobody deplores it more than I do, but the law specifically says custom and usage and we are bound by the law, since this is a suit for damages. We are not talking about the 1964 Civil Rights Act.

MRS. PIEL: Your Honor, but custom and usage—

THE COURT: This woman is suing for half a million dollars worth of damages under a statute which says that it has to be done pursuant to a custom and usage which is supported by the state.

MRS. PIEL: We have the legislation of the state supporting the principle of the not mixing of the races. We have several statutory expressions of that in a joint resolution, in a statute directed to the executive branch of the government, and in criminal statutes, which provide for punishment of people who advance the mixing of the races. We have that on the one hand, and we have, according to Miss Adickes—

THE COURT: But in this restaurant there were both white people and colored people, there is no question about it.

MRS. PIEL: That may be, but the discrimination that was involved here was a discrimination that involved the mixing of the races.

THE COURT: They came in together, but they were mixed in that restaurant certainly.

MRS. PIEL: But not in the same way as a party together, your Honor. I think that you are viewing this very narrowly. These people, the Negroes and the white person in the group we have in the case at bar were mixed much more closely than people who rub shoulders as members of the public who don't know one another. That is a distinction which I would think would be obvious, your Honor, that when you are talking about the mixing of the races you come much more closely to the mixing of them if you have a group of people together.

THE COURT: Let's assume that is true. But was the refusal to serve a white person in the company of [165] colored people on the basis of the evidence that you have presented here the custom and usage then in existence in that locality?

MRS. PIEL: We have testimony—

THE COURT: Your witnesses who have testified have been unable to cite an instance where this specific thing happened. You have, you say, a witness who could testify to another instance involving a movie house, but the law requires a little more than that, certainly, even in the most liberal sense to establish a custom and usage under the law. That is what you are obliged to prove, it seems to me, under Judge Bonsal's decision and under your pre-trial order in this case which defines the issues. Its true custom and usage must grow out of various factors behind them that create the custom and usage, but you have to have a custom and usage. The mere fact that there is antipathy between the races, which nobody disputes, and you could bring in a hundred witnesses to testify to that, and the Court could almost take judicial notice of it—

MRS. PIEL: I would think so, your Honor.

THE COURT: —in Mississippi, but that doesn't make an isolated one or two instances of the [166] expression of that antipathy a custom and usage. Under your theory anything that was done which could be related in any way to antipathy between the races automatically becomes a custom and usage because this antipathy was a generally exist-

ing condition in the State of Mississippi over a period of years.

MRS. PIEL: I think it was much more than an antipathy, your Honor. It was actually a policy against the serving of Negroes in the company of white people anywhere in Mississippi. The basic reason that Negroes were not served was because white people were not present. I mean going back to what the policy was. So this is a refinement of that custom when you say you will serve the Negroes and not serve the white person. That is the same policy, and it is a different expression of it.

THE COURT: I can't see that it approaches a custom or usage. At any rate, we haven't argued the point yet. On the question that you did propose before, namely, on the matter of the introduction of evidence as to the financial worth of Kress, the weight of authority clearly is against it so that the ruling is against you. Now, I assume that you have rested.

[167] MRS. PIEL: Yes, I have. I assume your ruling is going to be against me on the other matter.

THE COURT: Excuse me?

MRS. PIEL: When I said I rested, there was a matter pending with regard to the expert.

THE COURT: I thought we ought to clear that up before you rested.

MRS. PIEL: Yes.

MR. LITVACK: Your Honor, at this time the defendant Kress would like to move, pursuant to Rule 58 of the Federal Rules of Civil Procedure, for a directed verdict in its favor. Essentially, there are two grounds for the motion, your Honor. I would propose to only talk about one since I think it is dispositive of the entire issue, although I would be happy to go on and talk about the other, if your Honor desires.

The two grounds are, first, and foremost, I think, as I said, dispositive of the issue, the fact that plaintiff has completely and totally failed to offer any proof which could be submitted to a jury upon which it could base a verdict for

her, no matter how viewed. Secondly, as a matter of law, your Honor, under [168] the facts here there simply was no state action under Section 1983.

With respect to the first, we all know that at this stage of the case the plaintiff has put in its case and the law is that the plaintiff shall be given every reasonable inference which will flow from the testimony which has been offered. Nonetheless, the fact is that if the plaintiff has not offered any evidence upon which a jury could predicate a finding in her behalf a directed verdict should be entered. Under the pre-trial order in this case, and Judge Bonsal's earlier ruling, there are several elements of plaintiff's case. Let's just talk about the first two. First, the plaintiff has to prove the existence of a custom in Hattiesburg, Mississippi, on August 14, 1964, of refusing to serve white people in the company of Negroes where the Negroes were served. That is what happened in this case. The plaintiff has offered the testimony in this regard of four witnesses. There are no documents so we need not consider any other evidence other than the four witnesses. Plaintiff herself took the stand [169] and conceded that she knew of no instance where a mixed group had gone into a public restaurant in Hattiesburg, Mississippi, and a white person had been refused service while the Negroes were served. She knew of absolutely no instance. Moreover, as we know, the plaintiff in fact had only been to Mississippi for a weekend in June and only to Hattiesburg only in July, four or five weeks before the incident in question. By her own testimony she knew of no such instance and could offer no such proof.

The testimony of the other three witnesses is equally inadequate and offers no testimony on this point.

We asked each of the witnesses, and in some cases, your Honor, I gather these are people who lived there a substantial part of their lives, I know one witness said she had lived there 14 years, another said she had lived there until she went to college. Miss Carolyn Moncure, who was the first witness to testify, stated she did not know of any occasion in Hattiesburg, Mississippi, based on all her

time there wherein a white person was refused service but the Negroes were offered service.

[170] Likewise Miss Jimmella Stokes testified to the same effect. Finally, Diane Moncure testified she did not know of any occasion on which this happened. They all testified and they all admitted that Kress had served Negroes, indeed had served them on other occasions. They all testified and admitted that they had sat at a lunch counter at Kress at which white people were sitting. There is only one set of facilities, your Honor. And they had been served, as had the white people. None of them knew of an instance anything like this, and it is not surprising, because the fact is this is a most unique situation. I am sure it just never arose before and to my knowledge in fact never arose again.

If there was any custom in Hattiesburg, and I think the Court mentioned earlier perhaps you could almost take judicial notice of it, there was a custom, perhaps, over the last hundred years, of discriminating against Negroes. No one abhors that custom more than I. But I don't think that makes any difference here for two reasons. One, in fact the Negroes weren't discriminated against, and Kress had a policy against that. Secondly, it is not an issue [171] in this case. The plaintiff was not a Negro, the plaintiff was a white person who claims that when the Negroes were served she was refused for reasons which she has been unable to establish.

In short, your Honor, I think there has been a total and complete failure of proof on this point. The second point is that the plaintiff is required to prove under the pre-trial order that even assuming—I say there has been no proof, none whatsoever, nothing that could go to a jury—that there was such a custom, this custom has to have been enforced somehow by the state through Section 204.65 of the Mississippi Code, because conceivably under the law the customs of the people even if they exist are not sufficient under Section 1983. There has been no mention in the plaintiff's entire case of Section 204.65. There has been no one shred of testimony, not one word said, whereby a jury could find or consider or even think about whether

or not this section of the code was ever used to enforce these provisions.

We call to your Honor's attention the fact that to the contrary the courts have taken notice of the [172] fact that Section 204.65 has never been used to enforce any custom in the State of Mississippi. There are no cases showing that it's ever been enforced.

So I think not only has there been a total and complete failure of proof, but the fact is if you had to draw an inference based on the law and based on what the courts have said it would be to the contrary.

As I say, your Honor, that is merely the first ground. The second ground is as a matter of law, and I think the first ground is dispositive of the issue and therefore unless your Honor desires to hear something I will sit down and allow Mrs. Piel to go ahead at this time.

MRS. PIEL: In some way I feel almost, your Honor, as though I had gotten my whistle stuck, because it seems to me that the issue that we are talking about is not quite the same issue. The issue that Mr. Litvack is talking about here is not the issue that I am talking about. What we are talking about in this case is a long-standing custom and usage in Mississippi. By long standing perhaps not as long as some customs. Actually, it was only one that developed after the reconstruction period. Not even in that area did it develop, it only really started in about [173] 1900 when the policy of the segregation of the races became the policy of the South.

However, as of 1900 and thereafter it did become an absolutely established policy and custom, of which your Honor can take judicial notice, and of which the Supreme Court of the United States has taken judicial notice in a number of its decisions starting with Brown, that it was the policy of the white communities and governments in the southern states, Mississippi being one of them, to prevent the mixing of races in public places. This doesn't apply to private places. The Negro was in the homes of most people in the South. In a servile position, but in the home. But in public places the Negro did not show himself with the white person.

I suspect that prior to 1964 if you were to ask for proof of that by asking how many Negroes had been excluded from the eating places, from hotels, from theatres, where white people were, you would find there weren't any cases, there weren't any instances. The custom was too pervasive that nobody tried it. And the only testimony that you would have would be that people would say, "Negroes just don't go there."

Now, there came a change in all this, and that [174] change was sponsored, really, by what came first, the action of the Supreme Court of the United States saying this was not equality in this country, that we can't have this kind of policy. Even though you can go back to the 14th Amendment, even though you can go back to this civil rights statute we are talking about now, the Supreme Court said we have to pay attention to these things, we can't close our eyes to them, as you can read a lot of cases where eyes have been closed to this situation. This is not the policy of the law today.

Now, what happened? Something really happened in 1964. Not only was the Civil Rights Act passed and went into effect, but also a great project went on in Mississippi, and that project was sponsored by the Council of Federated Organizations, and it involved school teachers, it involved lawyers, it involved school children, it involved college students, and it was a massive and brave action where all these people came into the State of Mississippi to show to the Negro people there that at least there were some people, some white people, in the United States who didn't feel as the local white people. And these white people went down to Mississippi in order to give the Negroes [175] strength in terms of their overturning this custom and usage which was against the mixing of the races in public places. That really is the policy we are talking about. That is the policy that the Civil Rights Act is talking about. And in the Hamm case which I have cited in my brief there are ringing phrases which would suggest as of July 2nd it was no longer the policy of this government to discriminate. I had thought

we had that policy many years ago, but nonetheless the Supreme Court said as of July 2nd it isn't the policy any more to discriminate against the mixing of the races.

Now, what happened in this case? There is no real dispute over what happened, at least so far, that the plaintiff was refused service because she was in the company of Negroes.

If we go back one step as to why this happened in terms of the contemporary history we know that far more odious to the white person in Mississippi than the Negro was the white person who was the agitator, who was the person giving the Negro the courage to go about with his head high and to use public facilities.

You know, also, that the only way, or the strongest way, that the white community could enforce [176] its custom and usage against the mixing of Negroes and white people in public places was to look for ways to perhaps technically or apparently follow the letter of the law while nonetheless discriminating pursuant to the custom, because, after all, the custom was against the mixing of the races in public places.

Now, it can be said that Kress permitted the mixing insofar as it permitted Negroes to come into its establishment and be served simultaneously with white persons, but there is this distinction that if the Negro came in with a white person, in the company of a white person, that involving mixing in a more intimate way than being a mere member of the public that that is the ultimate violation of the custom and usage in Mississippi. And that is what we have here.

It seems to me that all the evidence in this case established that. Even the evidence that Mr. Litvack asked Miss Adickes on cross-examination, wasn't it true that white people were beaten up when they were in the company of Negroes, and Miss Adickes said yes, that is another instance of an expression of this kind of custom and usage.

We have evidence in here of other incidents brought out on cross-examination. As I say, it's an [177] Alice in Wonderland world because—

THE COURT: Let's assume the custom and usage we are talking about here is, in the broad sense, the custom and usage of separating the whites from the blacks, although you render them both service.

MRS. PIEL: Plessy v. Ferguson, separate but equal.

THE COURT: In this particular case, what evidence do we have that it was enforced in any way by the state?

MRS. PIEL: That is another question.

THE COURT: Supposing the restaurant wanted to do it, but it was just its own unique way of operating. It didn't call upon the state in any way to support it. Would you come within the statute?

MRS. PIEL: I think that we do, because I think if you look to the local statutes and the legislative—

THE COURT: It is not looking to the local statute, it is looking to the use or the enforcement of the local statute.

MRS. PIEL: I would say that if the—

THE COURT: It is also looking to the case that is before me, not a hypothetical case.

[178] MRS. PIEL: Correct, your Honor. However, Mr. Litvack did say that we didn't bring out any evidence with regard to the law, and I have cited in my proposed instructions which I just handed up—

THE COURT: The Court takes judicial notice of the laws of Mississippi.

MRS. PIEL: Exactly. That is my point. So any law that would apply to this situation is before you insofar as we have called it to your Honor's attention. It seems to me the complexion of the laws which were presented to you in our Exhibit A shows that the state directs its citizens, its law enforcement officers, and its citizens in general, to follow a policy of segregation by making it a criminal offense to conspire with somebody not to segregate, by permitting a storekeeper to tell anyone it chooses to leave. I think you can further take legislative cognizance of the fact that all these statutes were passed at about the time the Brown decision reached Mississippi.

THE COURT: Yes, which was the school situation.

MRS. PIEL: Right. But they were all passed with the idea in mind—

[179] THE COURT: And this was about ten years or more before the incident we are dealing with. There must be some credit for what little improvement there has been.

MRS. PIEL: It is all a question of how one gives credit.

THE COURT: It is a question of degree, and I am sure we would all be happier if it was a greater degree.

MRS. PIEL: Perhaps I am more impatient than you, your Honor, but I feel in this case there couldn't be a clearer expression, first on the part of the legislature going back there to the Brown decision. You may say that arose out of a school case, true, but in the legislation that the Mississippi legislature was dealing with they went broadly. They spoke of places of recreation and assembly. They didn't confine—

THE COURT: They were merely putting in the form of words what had existed for a long, long time.

MRS. PIEL: Correct, the custom and usage, of course, your Honor. Of course. But I am saying that when they did it they are answering your Honor's question with regard to, can we look to a statute? This is something that bothers me a bit, [180] because if you read the language of 1983 it is in the disjunctive, it is statute or custom and usage. It is not custom and usage supported by statute. We know there are long lines of decisions which interpret it as custom and usage supported by statute. But I wonder whether or not that is an appropriate interpretation in view of the plain statement as to what the Civil Rights Act is talking about the Supreme Court has made from 1964 on, and whether or not we are obliged to read the language as it reads, which is either statute or custom and usage.

I maintain in this case we have got the statute, but assuming, for whatever technical reason your Honor might look at it and say that this statute doesn't cover this situation, I still feel we have custom and usage, and that is all we need.

THE COURT: The thing is what use is made of the statute. But the thing that puzzles me is, even taking things in

the broadest possible sense, if the custom and usage was not to serve whites, or not to render services to whites in the company of colored people, that situation, since they didn't serve the colored people, didn't arise, did it, until we had a sufficient change in the law so that they served the [181] colored people.

MRS. PIEL: That's correct. Probably this incident wouldn't have taken place if the Civil Rights Act hadn't been passed.

THE COURT: That's right. And that was passed only six weeks before this incident.

MRS. PIEL: But it was nonetheless an expression of the basic feeling of the mixing of the races. If you go back to what they are talking about, the mixing of the races, this is that situation.

THE COURT: Maybe you can say that I am too narrow, but, after all, you are so broad in your argument here that anything that happened could conceivably be related to this long existing antipathy, for example, hate, or whatever you want to call it, between the races in Mississippi, and by reason of that relationship becomes a custom and usage.

MRS. PIEL: I don't say anything, your Honor.

THE COURT: Custom and usage in the eyes of the law has a little more limited definition and you are trying to substitute the cause of a particular custom and usage for the custom and usage itself. You see, that is what concerns me here. I can't seem to escape [182] that particular thought.

MRS. PIEL: There is no way I can reach what seems to be your Honor's mind that because the Negroes were offered service that they weren't being discriminated against in this case. They really were, you see. They were being discriminated against because they came in with a friend that wasn't served, and that in its totality—

THE COURT: Then I suggest they bring the suit.

MRS. PIEL: It is also Miss Adickes' suit. It is discrimination as to both of them. She was discriminated on account of race, because she was white in the company of Negroes, and they were discriminated against because they weren't permitted to eat with their friend. So it was a mutual discrimination.

THE COURT: If it was a discrimination, not part of a custom and usage to so discriminate. In other words, to serve one race and not serve the other if they were in one small group but to serve all of them if they happened to come into the restaurant separately. And there is no dispute that there were both white and colored people being served in this [183] restaurant.

MRS. PIEL: Not at this moment. Not on this particular occasion. But that it had happened there is no dispute. There is no dispute.

THE COURT: I don't think there is any dispute they served both blacks and whites.

MRS. PIEL: But they didn't serve them together, and it seems to me that is the same kind of argument you have in separate but equal. It really is.

THE COURT: This is a court of law, unfortunately, in which to present philosophical arguments which I could otherwise appreciate; we do have certain requirements of proof that must come within a statute where you are attempting to claim damages. One of those is that you prove a custom and usage, not that what happened is symptomatic of a condition that has existed for a long time in that community.

MRS. PIEL: I offered to bring the witness who could have given you—

THE COURT: You told me what he could testify to. You not only made the offer very late in the game, as you know, but you also indicated what he would testify to.

[184] MRS. PIEL: As you know, it is the plaintiff's contention—and I don't wish to repeat myself too often—that we really have proven at this juncture our case. It is really for your Honor to decide.

THE COURT: Do you have any legal authority on that?

MRS. PIEL: I think it exists in our trial memorandum in general.

THE COURT: On custom and usage.

MRS. PIEL: It is plus the testimony of Miss Adickes with what she observed.

THE COURT: If plaintiff can show defendant discrimi-

nated against her pursuant to a custom and usage enforced by the state under a particular section of the Mississippi Code by refusing service to whites in the company of Negroes she will satisfy the state action requirement of 42 U.S. Code 1983 under which she is suing.

MRS. PIEL: Right. I offer under that to answer that question the laws which I have appended as Exhibit A as indicating the statutory rules of the State of Mississippi, the state action of the State of Mississippi with regard to the mixing of the races. [185] I offer nothing more than that, plus the testimony of the witnesses.

THE COURT: Let us pass then to whether you have offered any evidence to show that this custom was enforced. I am speaking of the record in this case.

MRS. PIEL: Whether it was enforced?

THE COURT: Enforced by the state. There may have been a law on the books, but I don't think that is sufficient. These people were not asked to leave, they left voluntarily in this case.

MRS. PIEL: That's correct, your Honor. This is not a trespass case.

THE COURT: There is no evidence whatsoever—

MRS. PIEL: There is no evidence that other than the fact that the statute is there that the defendant was acting—

THE COURT: So you are relying purely on the statute.

MRS. PIEL: As to the state action part, yes.

THE COURT: Without any evidence whatsoever that that statute has ever been used to enforce this discrimination of which you speak?

MRS. PIEL: No. That's right.

[186] THE COURT: In the record.

MRS. PIEL: That's right.

THE COURT: I am talking about in the record.

MRS. PIEL: That is absolutely right.

THE COURT: Mrs. Piel, even if I were told that the custom and usage we are talking about meant not a manner of expressing a prejudice but a prejudice itself, still we have no evidence of any state implication. Even if the state is up

to its neck or to its ears or over its head in fostering this discrimination in the face of present law on the record before me, no matter what I may know or read in the papers or anything else there is not a thing in this record to indicate that that has ever been enforced by the state. I have to take the record of the case before me.

MRS. PIEL: You are being so patient with me, your Honor—

THE COURT: Because this is important, and I don't like to summarily dismiss these things.

MRS. PIEL: I appreciate that. I think there is one further factor that could be looked at, and that is the presence of the police officer. In other words, there was a law enforcement officer in [187] the Hattiesburg store at the time of the incident.

THE COURT: I don't question that, but if there had been that—well, not if, there was a police officer there, we will accept that. He didn't have any conversation with these people, he didn't threaten them, or anything else.

MRS. PIEL: No.

THE COURT: If you had introduced evidence to show there had been similar occurrences where the people who weren't served were told to get out and refused and they called the police, which they did in the case of the library, then you would possibly have something.

MRS. PIEL: We weren't permitted to show it, but in this case we have the case where the plaintiff was arrested by this policeman.

THE COURT: She wasn't arrested in the restaurant.

MRS. PIEL: No, but immediately after she got out.

THE COURT: That was stricken from the case by Judge Bonsal.

MRS. PIEL: That's right.

THE COURT: Don't ask me to decide cases [188] that aren't before me. I have to look at the case as it is, the way it comes to me. I seriously question whether there had been a custom of not serving white people but serving colored people prior to the Civil Rights Act.

MRS. PIEL: I think that is construing the whole thing too narrowly.

THE COURT: I think you will agree there was not that particular custom. There may have been another custom of not serving any of them.

MRS. PIEL: It was a custom against the mixing that found its expression any way the person exercising it sought to do so. It was a custom that mostly went against serving Negroes. But it is a custom against mixing. Looked at that way we have a case. If you say the custom has to be in view of the narrower one there aren't many instances because it didn't happen as often. The basic custom was against the mixing of the races, but again I have said this a few times.

THE COURT: Even if I were to accept that very broad interpretation of custom and usage to cover any manifestation of the antipathy between the white and black races I just don't see how there would be [189] anything to submit to the jury on the question of whether this was enforced by the state in this particular instance in the record of this case.

MRS. PIEL: I understand what you are saying.

THE COURT: I am not talking about what you may know and what I may know or what anybody else may know. I am talking about what this jury is restricted to, and that is the record before it.

MRS. PIEL: I have made my argument, your Honor.

THE COURT: It is a very good argument, and you may be right on the broad argument that what you are talking about as custom and usage is the custom and usage vis-a-vis the white and black races in Mississippi. But how are we to infer the defendant knew about it, or how are we to infer it was state enforced on the record before the Court? That is what I have to deal with.

MRS. PIEL: Yes, sir.

THE COURT: Do you want to add anything?

MR. LITVACK: No, your Honor. Unless there is something further your Honor would like me to discuss. If your Honor has any questions I would be glad to [190] answer

them, but it is clear we are talking about the record, and if we look at the record itself in my opinion very clear that we are entitled to have the motion granted and a verdict directed in our favor.

THE COURT: As I say, you are relying really on the existence of a state statute with no evidence of its use in this regard.

MRS. PIEL: The evidence is clear that the statutes were on the book and the defendant took this action and there was a policeman. It is all inferential.

THE COURT: Do you have any argument with respect to the point that was raised by counsel for the defendant that this statute is merely notification of the common law principle?

MRS. PIEL: The common law principle has been specifically—

THE COURT: I am not talking about the resolutions that were passed, I am talking about what we might call the trespass statute.

MRS. PIEL: Yes, but I believe in Hart of Atlanta, or Katzenbach, or Hamm, in one of them there is some statement that a restauranteer, if his goods move in interstate commerce, there is no common law [191] right to refuse anybody, and that the Civil Rights Act is—

THE COURT: The Civil Rights Act does not grant damages.

MRS. PIEL: That is true. No doubt about it. In fact, there is a section in it that says its remedy, being injunction, is exclusive to it. But the Supreme Court in this broad language says we now have the policy of the law, and it seems to me we have to pay attention to what the Court says. This is the policy of the law. There is no longer any more the common law right to do what this statute permits you to do.

So that when the defendant did this he was violating the federal law and following the state law. His action was in accord with 2056.5. He had every right under 2056.5 to do this. The state supported him in doing it.

THE COURT: What evidence have you introduced that the state supported it?

MRS. PIEL: The fact the statute is on the books, that is all.

THE COURT: That is all?

MRS. PIEL: Yes. Supported it, it had a right [192] to do it, under the state law. And I think that is what Judge Bonsal was saying. Well, maybe not. In any event it could be interpreted as saying since the statute is on the books you have state action. We have a new concept today of what state action is. We don't construe it as narrowly as we did before. There is a lot of law that says we don't look at state law the way it used to be looked at. The Negro lawyer by the name of Williams who was so unredoubtable in bringing cases one after another with regard to violations which he himself suffered with regard to the refusal of services, each time he was turned back because the court said no state action, and in the last one they put in a footnote and says, we note none of the instances in these cases occurred before the Civil Rights Act.

THE COURT: I know.

MRS. PIEL: I feel I am supported in the law with regard to the state action.

THE COURT: I don't want to deal with this summarily. I will excuse the jury and have them come back at 2 o'clock.

(Adjourned to 2 P.M.)

[193]

AFTERNOON SESSION

THE COURT: I am sorry to bring you back, but I do want to cover all of these arguments that have been made. I think we have pretty well explored the whole matter. The various authorities are set forth in the defendant's memorandum for the directed verdict.

The evidence, as I have indicated, is such that I, strain as I will, I couldn't find as to this particular case that there was any custom or usage. I certainly don't dispute that it could be shown that there was a custom and usage of discrimination in the past. Whether that would qualify as a

custom and usage in the eyes of the law I don't know. It is certainly a way of life so far as the people in Mississippi were concerned. But strain as I will I can't find state action here. Certainly not on the authority in the cases. I find it difficult to differentiate the Williams cases. It is true, as you pointed out, that they arose prior to the 1964 Act. I question whether under the law imposing liability you can read the statute that imposes no monetary liability into that particular statute something passed almost a [194] hundred years before.

My feeling is, also, that there is a failing of proof. Some cases I have seen of statistical material that was submitted to show what the state of the race relationships were as to the use of various types of facilities. *Tisziak v. the Atlantic White Tower System*, 181 Federal Supplement 124, affirmed 284 Federal 2d 746, they offered statistics as to the percentage of restaurants in Maryland that did not discriminate and those that did.

I have nothing here at all except one or two instances plus the broad statement that the white people in Mississippi had nothing to do with other white people who would eat with colored people. But these cases hold that regardless of what the feelings of the people of the community are, if you don't have enforcement by state action, or if it isn't such a custom and usage in the eyes of the law that it is almost on the same standing as law itself, and recognized by the state, that this is a private action which, rightly or wrongly, has been held not to be covered by the old Civil Rights Act.

So that is what I am faced with, it seems to me. And on that basis I will direct a verdict for the [195] defendant. I don't like to do it, but I don't see any way out. I can't see imposing liability in the case. Aside from the law, this company is not one that is on a par with other institutions in the South in its practices.

Very well, I will call the jury in and advise them.

(Jury present)

2:15 P.M.

THE COURT: Members of the jury, I have heard argu-

ments this morning, as you know. The plaintiff rested at the completion of her case and the defendant moved for a directed verdict on the grounds that the plaintiff had not made out a case under law. The particular statute under which this action was brought, which involved a suit for damages and not a suit to enjoin certain practices, arose under quite an old statute, a statute passed a good many years ago, not long after the Civil War.

In order to succeed it would have to be shown that the action of the defendant was authorized by some state statute, or was done under the color of some custom or usage.

I don't think that there would be any dispute [196] that over the years there has been a practice of discrimination in certain states in the South, and in Mississippi, and undoubtedly that could have been shown. The particular act here involved the rendering of services to colored people but denying it to white people who were in the company of colored people.

Since over the years the colored people would not have received the service it would be very difficult to show that there was a custom and usage of not serving white people who were in the company of colored people, and there was not, in the opinion of the Court, sufficient testimony of such a custom and usage in Mississippi, or in Hattiesburg, or knowledge on the part of the defendant of such a custom and usage, to have the case go to the jury, or that such custom and usage, if it existed, was enforced by the state. In this particular case, of course, the only evidence was that these people left voluntarily. There was some testimony of a police officer being present but so far as this case was concerned there was no police action involved.

Accordingly, there was no evidence, or insufficient evidence, to permit the case to go to the [197] jury and the Court, accordingly, directed a verdict for the defendant.

Of course, the plaintiff has a right to appeal that decision on the part of the Court but the Court felt obligated under the circumstances it was the only course it could take. I am sorry to bring you back but there was always a chance

that we would proceed with the defendant's case, and naturally I couldn't excuse you, but you are excused, with the thanks of the Court and, unfortunately, you will have to report tomorrow morning to room 109 at 9:30, but you have the rest of the day off.

I appreciate your attention during the course of the trial.

(Jury excused at 2:20 P.M.)

THE COURT: Thank you, ladies and gentlemen. The court stands adjourned.

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SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 179

SANDRA ADICKES,

Petitioner,

against

S. H. KRESS AND COMPANY,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 1223

SANDRA ADICKES,

Petitioner,

against

S. H. KRESS AND COMPANY,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Respondent S. H. Kress and Company (hereinafter referred to as "Kress"), defendant below, opposes the granting of the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit on the grounds that the Petition fails to satisfy the requirements of Rule 19 of the Rules of this Court, and, further, fails to set forth any special, important or extraordinary grounds for the Court's exercise of its discretionary certiorari jurisdiction.

Opinions Below

On March 14, 1966, the United States District Court for the Southern District of New York, after the completion of full discovery, ordered summary judgment with respect to petitioner's claim that Kress had entered into a con-

spiracy to deprive petitioner, the plaintiff below, of her civil rights, finding that there was

“no evidence in the complaint or in the affidavits and other papers from which a ‘reasonably-minded person’ might draw an inference of conspiracy.”

The opinion (Honorable Dudley B. Bonsal, U. S. D. J.), reported in 252 F. Supp. 140 (S. D. N. Y. 1966), is contained in Appendix B.*

On February 15, 1967, the United States District Court for the Southern District of New York (Honorable Charles H. Tenney, U. S. D. J.) entered an order and judgment directing a verdict in favor of respondent on the ground that petitioner had failed to offer proof of a violation of the Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983.

On December 27, 1968, the United States Court of Appeals for the Second Circuit affirmed both decisions of the District Court, finding that

(a) there had been no proof of a violation of Section 1983; and

(b) the claim of conspiracy was unsupported by any facts tending “to suggest a conspiracy”.

The opinion of the Court of Appeals is contained in Appendix B.

Jurisdiction

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals affirming the District Court’s judgment dismissing the complaint; discretionary jurisdiction would be founded on 28 U. S. C. §1254(1).

* References to the “Appendix” are to petitioner’s Appendix submitted as part of the instant Petition.

Statutes and Rules Involved

The Statutes and Rules pertinent here are:

Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983;

Rule 56, Federal Rules of Civil Procedure; ..

Rules 13(b)(1) and 16 (a-b), Calendar Rules of the United States District Court for the Southern District of New York.

Questions Presented

Respondent submits that the Petition does not present any "special and important" question, or, indeed, any question of substance. This action was decided by the Courts below on the unique fact situation involved. The questions presented to the Court of Appeals were:

1. Whether the District Court properly exercised its discretion in granting summary judgment dismissing a claim of conspiracy where, after full discovery, petitioner produced no facts to support the claimed conspiracy and there was specific proof negating such a claim.

2. Whether the District Court correctly exercised its discretion in refusing to allow an amendment of the complaint to allege a claim under a statute, declared unconstitutional almost 90 years ago by this Court, where the statute had no applicability to the facts presented, irrespective of its constitutionality.

3. Whether in an action for damages, brought pursuant to 42 U. S. C. §1983, for failure to serve a person at a lunch counter, the District Court correctly ruled that there was no state action.*

* The phrase "state action" is used by the courts and in this brief as the equivalent of, and interchangeable with, "under color of state law." See *e.g.*, *United States v. Classic*, 313 U. S. 299 (1941).

issippi Code, §2046.5, of refusing service to whites in the company of Negroes"—this, said Judge Bonsal, "will satisfy the state action requirement of 42 U.S.C. §1983" (A. 183). Judge Bonsal's opinion sets out the further dictum that, as to the enforcement of the "custom," petitioner would have to show, in addition that respondent's store manager had knowledge of or was influenced by Mississippi Code §2046.5 [See Point I-*supra*] in ordering the waitress not to serve petitioner (A. 183).

Judge Bonsal's interpretation did violence to the language of §1983 which grants a cause of action to a person subjected to a deprivation of his rights "under color of any statute, ordinance, regulation, custom, or usage, of any state . . ." The statutory language clearly lends federal support to the individual's assertion of his constitutional rights against either state law or against custom that would deny him such rights. Judge Bonsal derived his interpretation by reference to the Civil Rights Act of 1964 which defines "custom or usage" as that "Required or enforced by officials of the state" [42 U.S.C. §2000a(d)] (A. 182). The effect of this interpretation is to narrow and limit the right to a cause of action and to require proof that a custom of refusing service to whites in the company of Negroes—which, in expression of a state policy against the "mixing" of the races, might be universally followed in a state by its residents, citizens and inhabitants—must not only be followed but *enforced* by state officials. Judge Bonsal further suggested that the enforcement by state officials must be known to the charged violator before the violatee has a cause of action.

This Court in *Jones v. Mayer Co.*, 392 U.S. 409, 423 (ftnote) (1968), has recently underlined the distinction

intended by Congress as between "State or local law" and "custom or prejudice" as shown in the debate on the Civil Rights Act of 1866 (42 U.S.C. §1982).

Judge Waterman in his dissent in the court below consulted "The Reconstruction Amendments Debates" as republished by the Virginia Commission on Constitutional Government (1967) in seeking a contemporaneous interpretation and meaning for custom as it appeared in 42 U.S.C. §1983 in 1871 when the language became law; he concluded that the meaning expressed in Black's Law Dictionary 4th edition, 1951, would have been acceptable to that Congress (A. 213):

"A usage or practice of the people which, by common adoption and acquiescence, and by long unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject matter to which it relates."⁶

Judge Waterman further assailed the Bonsal logic which defines the custom as the refusal to serve whites in the company of Negroes. Such a "custom" could not obtain in a state so historically prejudiced against the acceptance of Negroes in public places in the company of whites that, until the Civil Rights Act of 1964, despite the language of the thirteenth, fourteenth and fifteenth amendments to the constitution, whites and blacks risked their very lives in any attempt to mingle (A. 214). Yet that refusal on August 14, 1964, was unequivocally an expression of the custom against public integration.⁷

⁶ Black's Law Dictionary, 461 (4th Ed. 1951) (A. 214).

⁷ The subtlety of the discrimination in the case at bar was not overlooked by Judge Waterman who quoted Judge Fuld of the

The framers of §1983 must have had this very custom or usage in mind when the law was passed. It was well known that the white "trouble maker" who advocated the cause of the black was doubly suspect. In the period immediately preceding the 1871 legislation, custom, prejudice and law in the South imposed sanctions on the white person who was friendly to the Negro. Viz.:

"The laws were particularly harsh on white persons who broke the prohibitions of the slave codes; the death penalty for whites was not infrequently the punishment for aiding a slave to rebel." Stamp: *The Era of Reconstruction*, p. 211.

"Mr. President, the condition which the thirteenth Amendment imposed on the late insurrectionary State was one which demanded the serious consideration and attention of this government. The equality which by the thirteenth, fourteenth and fifteenth amendments has been attempted to be secured for the colored men, has not only subjected them to the operation of prejudices which had theretofore existed, but it has raised against them still stronger feelings in order to fight down the equality by which it is claimed they are to control the legislation of that section of the country. They were turned loose among those people weak ignorant and poor. Those among the white citizens

Court of Appeals of N. Y. in *Holland v. Edwards*, 307 N.Y. 38, 45 (1954):

"One intent on violating [laws prohibiting discrimination] cannot be expected to declare or announce his purpose. For more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct . . . play no small part'" (A. 216).

there who have sought to maintain the rights which you have thrown upon that class of people, have to endure every species of proscription, of opposition, and of vituperation in order to carry out the policy of Congress, in order to lift up and to uphold the rights which you have conferred upon that class. It is for that reason not only necessary for the freed man, but it is necessary for the white people of that section that there should be stringent and effective legislation on the part of Congress in regard to these measures of reconstruction." [Remarks of Senator Pool of N. Carolina in Cong. Globe 41st Cong. 2nd Sess. pp. 3611-3613 cited in appendix to *U.S. v. Price*, 383 U.S. 787, 808, 809 (1966).]

and again:

"A small part of that population, but the worst part of it, banded themselves into felonious conspiracies, which take advantage of the unsettled condition of Southern society to commit assassinations, mutilations and other crimes . . . The most intelligent and probable explanation of motives imputes to them a rancorous and implacable discontent on account of the political and civil rights conferred on colored people by the constitutional amendments. Their operations are, therefore, directed chiefly against blacks and against white people who by any means attract attention as earnest friends of the blacks.

"The aim appears to put them under fear so that they will be silent when free men should speak, . . . If their main inspiration is hostility to the rights given to the colored under the thirteenth, fourteenth and fifteenth amendments it would extend to all who should befriend them; . . ." [Remarks of Congress-

man Perry, 42nd Cong. 1st Sess. 1871, "The Reconstruction Amendments Debates." Virginia Commission on Constitutional Government (1967) p. 512.]

Testimony adduced at the trial supported a factual finding of a similar situation in Hattiesburg, Mississippi, in 1964.

The petitioner testified that she had familiarized herself with the custom and usage in Hattiesburg of the general white community toward the mixing of white and Negro persons in groups; that she had had conversations with others about it and had concluded that it was the custom and usage not to serve white persons in public in the company of Negroes (A. 257); that she had observed that there was a policy in Mississippi of "opposition to the mixing of races" and the attitude of the community toward persons who "mix with Negroes" is hostile—all of which policy she had personally observed and experienced (A. 301, 302).

Another witness for the petitioner, Jimella Stokes, testified that she knew of acts of violence in Hattiesburg where white civil rights workers were attacked and beaten and that a large part of the violence "was directed towards the white civil rights workers in town in the company of Negroes" (A. 282).

Nonetheless, the majority opinion in the court below adopted the Bonsal test and required the petitioner to prove:⁸

⁸ The court below further stated that §1983 "required that the discriminatory custom or usage be proved to exist in the locale

1.) "a custom [described in 2 below] was enforced by the State of Mississippi pursuant to Mississippi Code Section 2046.5, a criminal trespass statute."*

2.) "a custom . . . of refusing service in restaurants to whites in the company of Negroes" (A. 204-206).

The court below disregarded the uncontroverted state of the record that there was testimony by the plaintiff and another witness as to its point (1) and that the court could take judicial notice of the existence of laws on the Mississippi statute books as to its point (2). Instead, it chose to disregard the testimony of the plaintiff because she "had never been in the State of Mississippi prior to June, 1964, and had never visited Hattiesburg until July of the year" (A. 205).

The plaintiff's testimony as to the custom against the public association of the races in Mississippi is underscored in contemporary literature in J. Silver, *Mississippi: The Closed Society* (1964), and in roughly contemporaneous decisions in this Court and lower federal courts. *United States v. Price*, 383 U.S. 787 (1966) (*Punishment and murder of civil rights workers by conspiracy of State official and private persons*); *Achtenberg, Adickes v. Mississippi*, 393 F. 2d 468 (C.A. 5, 1968) (*Same facts as case at bar—library and lunch counter discrimination*); *United*

where the discrimination took place and in the State generally" (A. 205). While this may not be an actual requirement of this statute [see Judge Waterman's dissent (A. 271)], it is not difficult of proof by reference to the records in the federal court system—see cases cited pp. 35-36 of this brief.

* Neither the court below nor the trial Judge Tenney reached the issue also posed by Judge Bonsal that the store manager knew of and acted pursuant to §2046.5.

States v. Richberg, 398 F. 2d 523 (C.A. 5, 1968) (*Cafe discrimination*); *N.A.A.C.P. v. Thompson*, 357 F. 2d 831 (C.A. 5, 1966) cert. den. 385 U.S. 820 (1966) (*Protest against racial discrimination generally in Jackson*); *Dilworth v. Riner*, 343 F. 2d 226 (C.A. 5, 1965) (*Restaurant discrimination*); *Meredith v. Fair*, 298 F. 2d 696 (C.A. 5, 1962) (*Segregation in schools and colleges*); *United States v. Harpole*, 263 F. 2d 71 (C.A. 5, 1959) (*Jury exclusion*).

Respondent discriminated against petitioner twelve days after the effective date of Congress' 1964 Civil Rights Bill which stated:

"All persons shall be entitled to the full enjoyment of the goods, services, facilities, privileges, advantages and accommodations, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin" [42 U.S.C. 2000a, Publ. L. 88-352 Title II §201 July 2, 1964, 78 Stat. 243].

The courts below evidently chose to disregard the reaffirmation in the 1964 Act of Congress' intention to eliminate race segregation in public places—"to obliterate the effect of a distressing chapter of our history." *Hamm v. Rock Hill*, 379 U.S. 306, 316 (1964).

POINT III

The pre-trial ruling barring petitioner from amending her complaint to assert statutory damages under the Civil Rights Act of 1875 was reversible error.

In 1875 Congress passed a public accommodations law which provided:

"Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law:

Therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"Sec. 1.) That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition or servitude."

"Sec. 2.) That any person who shall violate the foregoing section by denying to any citizen, except for

reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively." Act of March 1, 1875, ch. 114, 18 Stat. 335.

In 1883 this Court, per Justice Bradley, declared this law to be unconstitutional on the grounds that private discrimination on account of race is not a proper subject for federal legislation since it is not affected with "State action," the *Civil Rights Cases*, 109 U.S. 3, 13, Justice Harlan dissented in an extensive opinion; reviewing the history of slavery in the United States, he showed that,

prior to the Civil War, and the Emancipation Proclamation, the rule of slavery had been affirmatively enforced by the federal court system. *Viz.: Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539 (1842); cf. *Dred Scott v. Sandford*, 19 How. 399 (1856). The thirteenth, fourteenth and fifteenth amendments, Justice Harlan concluded, now required affirmative action by the federal government to enforce their provisions and to undo the history of federal action in support of slavery.

Justice Bradley conceded that Congress had plenary legislative power over matters concerning "commerce" but dismissed that source of power as affecting the Civil Rights Act.

In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), this Court upheld the constitutionality of the 1964 Civil Rights Act (42 U.S.C. 2000 *et seq.*)—the majority opinion, of Justice Clark, relying on the commerce clause and distinguishing the Civil Rights Cases on the grounds that the nineteenth century legislation did not limit the categories of affected businesses to those impinging on interstate commerce. The opinions declared further that the increase in population, technology and mobility since 1883 have changed the state of commerce so that discriminatory practices today make "a far larger impact upon the Nation's commerce than such practices had on the economy of another day" [*Heart of Atlanta, supra* p. 251].

Petitioner contends here that the Civil Rights Act of 1875 is still the law and that it gave her a valid cause of action to sue for damages in a mandatory sum of \$500.00 for the discrimination practiced against her. An

extensive argument for the validity of this position is found in Nimmer, "A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875," 65 Cal. L.R. 1394 (1965).

Certainly there has been a change in judicial thinking since the majority spoke for this Court in 1883—since the majority ruled in *Plessy v. Ferguson*, 163 U.S. 537, in 1896. See A. Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers L.R. 387 (1967).

In *Brown v. Board of Education*, *supra*, this Court consulted contemporary congressional debate and the circumstances surrounding the adoption of the fourteenth amendment in 1868 and concluded that "although these sources cast some light, it is not enough to resolve the problem with which we are faced." Reference to Reconstruction history and the Act of 1875 finds extensive debate, commencing in 1871, on the role of the federal government that was to evaluate in the passage of the Act of 1875 in securing and protecting the civil rights of individuals. The force of this Act was limited to the rights of the individual to public accommodations—but only after the Act had lost specific provisions as to equality in education and jury selection. See "The Reconstruction Amendments Debates", *supra* pp. 654-6, 657-661, 663, 671, 736-7, 740-3. Cf. A. Avins, "The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations," 66 Col. L.R. 873 (1966).

In the light of this history, it is ironic that Judge Bonsal, today, should supply a gloss to the Act of 1875 distinguishing the respondent's lunch counter from an "inn" and, on this narrow ground, should deny petitioner's motion to add a third cause of action to her complaint.

As to the definition of an "inn", Justice Harlan in his Civil Rights Case dissent stated:

"The word 'inn' has a technical legal signification. It means, in the act of 1875, just what it meant at common law. A mere private boarding-house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. 'To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travellers or wayfarers who might choose to accept the same, being of good character or conduct.' Redfield on Carriers, etc., §575. Says Judge Story:

'An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants. An innkeeper is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence . . . If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. . . . They (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest.' Story on Bailments, §§475-6.

"In *Rex v. Ivens*, 7 Carrington & Payne, 213, 32 E.C.L. 495, the court, speaking by Mr. Justice Coleridge, said:

'An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room

in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them with what they want.'

"These authorities are sufficient to show that a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person."¹⁰

Reference to the common law duty of the innkeeper to serve all without racial distinction is reaffirmed as pre-dating the thirteenth amendment was made by this Court in *Heart of Atlanta*, *supra* p. 261.

Petitioner maintains that a reading of the preamble of the Civil Rights Act of 1875 in conjunction with the specific language of the Act would bring the respondent establishment under its terms—as either an “inn” or a place

¹⁰ The public nature of the innkeeper and/or victualler's duty refers back to Point II, *supra*, and the common law duty that Mississippi Code §2046.5 changed.

of "public amusement" both of which are covered by language in the statute.

In this connection, incidentally, Nimmer expresses the misgivings that courts today might be inclined to distinguish lunch counters, shoppers' luncheon booths and restaurants as we know them from an "inn" as designated in the Act of 1875. Judge Bonsal below fully justifies this misgiving by making just such a distinction in refusing the plaintiff the right to sue under the Act of 1875, in an opinion that otherwise over-rides Nimmer's useful historical review (A. 185).

This limitation on the 1875 Act would not seem to be consistent with its purpose nor with a reasonable construction in the light of the nature of a luncheon service attached to a store where, according to stipulated fact, a part of its products travelled in interstate commerce (A. 192). Cf. *Williams v. Howard Johnson's Restaurants*, 268 F. 2d 845 (CA 4, 1959) (before passage of the 1964 Civil Rights Act).

In addition to her right under 42 U.S.C. §1983, petitioner had an independent right to assert a claim for liquidated damages under the 1875 Act.

POINT IV

Judge Bonsal's summary judgment on the basis of affidavits and unsworn statements against petitioner's conspiracy count, which was supported by circumstantial evidence, denied petitioner the right of trial on this issue.

Judge Bonsal set up trial standards rather than the appropriate pleading standards when he dismissed on summary judgment the conspiracy count in which petitioner alleged that the respondent Kress had engaged in conspiracy with the police department of Hattiesburg.

In support of its motion respondent relied upon the denials by the manager in his deposition and by two members of the police force and of the Chief of Police in their affidavits. Respondent, however, offered two unsworn statements of its employees which did not corroborate and were in apparent contradiction of the respondent's denial and of the testimony set forth in the deposition and affidavits of respondent's other witnesses. Dolores Freeman, the waitress who refused service to petitioner does not refer to any "explosive" situation and explained her refusal as merely in compliance with policy set by her supervisor (A. 178). Irene Sullivan, another employee of respondent, stated that Patrolman Hillman entered the store after petitioner and her students had come into the store and that she (Miss Sullivan) spoke to him (A. 179). Hillman was the officer who arrested petitioner immediately upon her departure from the store.

The facts of any such conspiracy are peculiarly within the knowledge of the respondent. Petitioner should have

had the opportunity at trial to draw out such facts from the respondent and to make use of the factual inferences surrounding the events of her first being discriminated against by respondent and then, immediately thereafter, being arrested by the police. See *Pollak v. Columbia Broadcasting Co.*, 368 U.S. 464 (1962).

Respondent should not have been permitted to rely upon the *ex parte* affidavits of the police officers and Chief of Police; this action by the trial court deprived plaintiff of the right of cross-examination. As this Court said in reversing a summary judgment in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944):

"It may well be that the weight of the evidence would be found on a trial to be with the defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight given to their opinions is to be determined after trial, in the regular manner."

See *Arnstein v. Porter*, 154 F. 2d 464 (CA 2, 1946); *Colby v. Klune*, 178 F. 2d 872 (CA 2, 1949).

Petitioner maintains that the conspiracy between respondent and the police department can, without more, be inferred from the sequence of events. As to such contention, this Court has stated:

"On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

To the same effect is *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464 (1962).

Judge Bonsal placed great reliance on *Morgan v. Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1954) affd. 220 F. 2d 758 (CA 2, 1955) cert. den. 350 U.S. 867 (1955) (A. 183). There a summary judgment was granted and affirmed in an action by a plaintiff under the Civil Rights Act (Title 42 U.S.C. §§1983, 1985) against various judicial, executive, and legislative officials of the State of New York. That summary judgment was predicated on the immunity accorded under the law to public officials acting in the course of their official duties and further upon the ground that there was no issue of genuine fact—no plausible ground for the maintenance of the cause of action alleged in plaintiff's complaint.

Morgan was not a case, as is the case at bar, where one unlawful act followed upon another—police action discriminating against petitioner and group at the library, respondent's act of discrimination against petitioner, and this act followed immediately by the illegal arrest of petitioner on the trumped-up charge of vagrancy.

The finding by the trial court in the present case that the refusal of service was not based upon race and was not "conspiratorial" is predicated exclusively on the self-serving statements of store manager Powell. It ignores petitioner's testimony that she was told by the waitress she was not being served because she was in the company of Negroes. Moreover, it callously accepts respondent's allegation that the situation was "explosive," as justification for respondent's invasion of the petitioner's civil rights and for the subsequent police action against the petitioner.

Such inverted reasoning—historically invoked again and again to justify deprivation of personal liberty by “protective custody”—cannot be appropriately invoked here. The facts before the trial court—supplied by the respondent as well as by the petitioner—warranted a trial of petitioner’s allegation of conspiracy against her civil rights.

This Court has repeatedly held that, on appeal from a grant of summary judgment, factual disputes must be resolved in a manner most favorable to the party opposing the motion and this is particularly true with regard to the invocation of rights under the federally created civil rights statutes. Cf. *Jobson v. Henne*, 355 F. 2d 129 (CA 2, 1966).

POINT V

It was error and an abuse of discretion by the trial court to deny petitioner the benefit of expert testimony on the issue of custom and usage when the testimony of experts was contemplated in the pre-trial order and due notice of their identity was promptly given one day before trial.

One day before trial, petitioner gave notice orally and in writing of her intention to call two expert witnesses to the custom and usage in Mississippi on the issue of the “mixing” of the races in public places (A. 227). She also filed a written amendment to the trial memorandum (this brief p. 10).

The pre-trial order specified that no more than two expert witnesses would be called by either side and that prompt notice of their identity would be given (A. 195).

Petitioner maintains that she was unable to ascertain who would be available until she knew certainly when the

case was to be tried, and petitioner's counsel protested her diligence in going about finding the appropriate expert from the moment the case was definitely set for trial. The names of the witnesses—Reverend Robert Beech and Andrew Gordon—were known to the respondent the day before the case was to go to trial (A. 229, 230).

Although the trial court considered the main issue in the case to be that on which these experts were to testify and subsequently non-suited the petitioner for insufficient proof on this issue, the trial court nonetheless ruled against permitting them to testify (A. 233).

Before petitioner rested, she reapplied to the court for permission to call one of the experts and made an offer of proof (A. 303, 304). Permission to call the witness, Andrew Gordon, was again denied (A. 305).

It is petitioner's contention here that expert evidence would have strengthened her case if it had been permitted to go to the jury and, accordingly, it was an abuse of discretion for the court not to permit the expert testimony. As it was, the trial court through the testimony of the petitioner and other witnesses to the events admitted evidence bearing on the customs against the "mixing" of the races in Hattiesburg, Mississippi, in 1964. Nonetheless, the trial court disregarded this evidence as it applied to the issues and as they should have been joined (see Point I and Point II of this brief).

This refusal of the trial court to receive expert testimony on the issue as erroneously framed—i.e.: whether in Hattiesburg in 1964 it was "the custom" to serve Negroes and refuse service to whites in their company—compounded the error and underlined the unfairness of the proceeding

as to petitioner. Apropos of this kind of judicial conduct as constituting an abuse of discretion the Court of Appeals for the Sixth Circuit has said in *Cohen v. Young*, 127 F. 2d 719, 726 (1942):

"The term 'discretion' implied the absence of a hard and fast rule. The establishment of a clearly defined rule of action would be the end of *discretion* and yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion means the equitable decision of what is just and proper under the circumstances.'"

"Whether action taken by the court lies within its sound discretion is ordinarily a question of fact whether under the rules of law and the established principles of practice, having regard to the rights and interests of all parties, justice and equity require the action in question. *Langnes v. Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 520. The exercise of discretion does not permit the court to disregard the substantive principles of law established for the protection of litigants. One of these principles is that judgments and decrees which make findings of fact shall be founded on evidence. Thus it is an abuse of discretion to refuse to receive and consider evidence by which the court's discretion should be guided or controlled. *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 6 Cir., 122 F. 2d 450, 453, 136 A.L.R. 883; *Commonwealth v. White*, 147 Mass. 76, 78, 16 N.E. 707."

Cf. *Springfield Crusher, Inc. v. Transcontinental Insurance Co.*, 372 F. 2d 125 (CA 3, 1967).

CONCLUSION

The judgment of the court below should be reversed and the case remanded to the District Court under appropriate instructions permitting petitioner to sue for damages under 42 U.S.C. §1983 and the Civil Rights Act of 1875.

Respectfully submitted,

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**TEXT OF CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

CONSTITUTION OF UNITED STATES

AMENDMENT XIII.

§ 1. SLAVERY ABOLISHED

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. ENFORCEMENT

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

§ 1. CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Sections 2-4 omitted)

§ 5. POWER TO ENFORCE ARTICLE

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.

§ 1. RIGHT TO VOTE NOT TO BE ABRIDGED

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

§ 2. POWER TO ENFORCE ARTICLE

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

STATUTES

42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress. R.S. §1979. Act Apr. 20, 1871, c. 22. §1, 17 Stat. 13.

Civil Rights Act of 1875

Chap. 114—An Act to protect all citizens in their civil and legal rights.

Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law. Therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less

than thirty days nor more than one year: Provided, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: And provided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

Sec. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States, or territorial court, as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district at-

torneys shall cause such proceedings to be prosecuted to their termination as in other cases: Provided, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: And provided further, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

Sec. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of misdemeanor, and be fined not more than five thousand dollars.

Sec. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States,

without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

Approved, March 1, 1875. [43rd Cong. Sess. II, pp. 335 et seq.]

GENERAL LAWS OF MISSISSIPPI—1956

Chapter 466—Senate Concurrent Resolution No. 125

A CONCURRENT RESOLUTION condemning and protesting the usurpation and encroachment on the reserved powers of the states by the Supreme Court of the United States and declaring that its decisions of May 17, 1954, and May 31, 1955, and all similar decisions are in violation of the Constitution of the United States and the State of Mississippi, and are therefore unconstitutional and of no lawful effect within the territorial limits of the State of Mississippi; declaring that a contest of powers has arisen between the State of Mississippi and said Supreme Court and invoking the historic doctrine of interposition to protect the sovereignty of this and the other states of the Union; and calling on our sister states and the Congress for redress of grievances as provided by law; and for other purposes.

Be it Resolved by the Senate of the State of Mississippi, the House of Representatives concurring therein, That the Legislature of Mississippi unequivocally expresses a firm determination to maintain and defend the Constitution of the United States, and the Constitution of this State, against every attempt, whether foreign or domestic, to undermine and destroy the fundamental principles embodied in our basic law by which this government was established, and by which the liberty of the people and

the sovereignty of the States, in their proper spheres, have been long protected and guaranteed;

That the Legislature of Mississippi explicitly and peremptorily declares and maintains that the powers of the Federal Government emanate solely from the compact, to which the States are principals, as limited by the plain sense and long recognized intention of the instrument creating that compact;

That the Legislature of Mississippi firmly asserts that the powers of the Federal Government are limited, and valid only to the extent that these powers have been conferred as enumerated in the compact to which the various states assented originally and to which the states have consented in subsequent amendments validly ratified;

That the inherent nature of this basic compact, apparent upon its face, is that the ratifying states, parties thereto, have agreed voluntarily to confer certain of their sovereign rights, but only specific sovereign rights, to a Federal Government thus constituted; and that all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, have been reserved to the states respectively, or to the people;

That the State of Mississippi has at no time, through the Fourteenth Amendment to the Constitution of the United States, or in any manner whatsoever, delegated to the Federal Government its right to educate and nurture its youth and its power and right of control over its schools, colleges, educational and other public institutions and facilities, and to prescribe the rules, regulations and conditions under which they shall be conducted;

That the aggrandizement of powers by the Federal Government has grown far beyond that ever conceived by the

authors of our Constitution, that the seizure and concentration therein of powers not granted by the compact under which the several states entered this Union, and particularly that by which Mississippi¹ entered the Union on December 10, 1817, threaten to reduce these sovereign states to mere satellites, and to subject us to the tyranny of centralized government, so rightfully abhorred by the founders, and for the prevention of which they exercised their finest genius;

That in late years the encroachment upon the reserved rights of the States and of the people has grown apace, and the proponents of the acts of encroachment have grown so emboldened that not one of the sister states and its people have escaped the oppressive hand thereof: In the destruction of their vested property rights; abridgments of their liberties; control of their institutions, habits, manners and morals by centralized bureaucratic instrumentalities; and in fact by various wrongful and obtrusive acts, too numerous to be here documented, but so consistently characterized by an oppressive course of action so as to seriously threaten to completely destroy our constitutional processes and substitute in lieu thereof ideologies foreign to the soil of our beloved land;

That one of the noblest characteristics of our people is the reverent respect for an obedience to the courts of law and justice, and that which more than any other has ennobled our institutions of government, and ought to be challenged only with the most dreadful reluctance, still it should be solemnly and firmly declared that the hand of tyranny ought to be stayed from whatsoever source it might strike;

That we profess an undying attachment to and a warm regard and respect for the sister states, and for this Union, which, through unwarranted and unconstitutional action of the Supreme Court, is fastly being dissolved by usurpation of powers reserved to the states and transferring them to an all-powerful centralized government which, unless halted, will reduce the state to impotent vassals, sheared of all rights and powers except those received at the sufferance of the Federal Government;

That a question of contested power has arisen; the Supreme Court of the United States asserts, for its part, that the states did in fact prohibit unto themselves the power to maintain racially separate public institutions, and the State of Mississippi, for its part, asserts that it and its sister states have never delegated such rights;

That the flagrant assertion upon the part of the Supreme Court of the United States, accompanied by threats of coercion and compulsion against the sovereign states of this attempt by the court to usurp the exercise of powers not granted to it;

That the Legislature of Mississippi asserts that whenever the Federal Government attempts to engage in the deliberate, palpable and dangerous exercise of powers not granted to it, the states who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties appertaining to them;

That failure on the part of this state thus to assert its clear rights would be construed as acquiescence in the surrender thereof, and that such submissive acquiescence

to the seizure of one right would in the end lead to the surrender of all rights, and inevitably to the consolidation of the states into one sovereignty, contrary to the sacred compact by which this Union of States was created;

That the question of contested power asserted in this resolution is not within the province of the court to determine because the court itself seeks to usurp the powers which have been reserved to the states, and, therefore, under these circumstances, the judgment of all of the parties to the compact must be sought to resolve the question; that the Supreme Court is not a party to this compact, but a creature of the compact, and the question of contested power cannot be settled by the creature seeking to usurp the power, but by the parties to the compact who are the people of the respective states in whom ultimate sovereignty finally reposes. BE IT FURTHER RESOLVED THAT:

In order that relief be obtained and the wrongs and injuries inflicted be alleviated, we invite all of our sister states to join in taking such steps as are necessary to settle the grave question of contested sovereignty herein raised; the State of Mississippi declares that the Congress has the duty and authority to protect the rights of the states from the unwarranted encroachment upon their reserved powers to govern the internal and domestic affairs of the states; the State of Mississippi further asserts that the Congress has, on many occasions in the past, curbed the attempted encroachment by the judiciary upon the legislative and executive branches of government, and it is the responsibility of the Congress likewise to protect the states when their constitutional rights and privileges are endangered;

The State of Mississippi declares emphatically that the sovereign states of the Nation have ~~never~~ surrendered

their rights and powers to control their public schools, colleges and other public institutions; therefore, when an attempt is made to usurp these powers, the people of Mississippi object and refuse to be so deprived, reminding the Congress that the preservation of this Union of States, as the compact intended it should be, depends upon the preservation of the sovereignty of the states;

The compact intended ours to be a government of the people, for the people and, above all, a government by the people; if the right to govern and control the local affairs to decide questions of public health, morals, education and safety are taken from the states, then a fatal blow has been dealt state sovereignty and the states are nothing more than vassal provinces, subject to a central government;

The State of Mississippi declares that it is the duty and privilege of a state to object to the aforesaid invasion of its rights and does hereby interpose its sovereignty to protect these rights; it is the duty of the Congress to halt such practices and save these rights; and if such cannot be obtained other than by amendment to the Federal Constitution, we appeal to the Congress, in the exercise of the power granted under Article 5 of the Constitution, to initiate and submit an appropriate amendment direct to the forty-eight states for ratification by three fourths ($\frac{3}{4}$) of the Legislatures thereof, declaring that the states have never surrendered their rights and powers to control their public schools, colleges and other public institutions and facilities to the Federal Government, or any department or agency thereof, but such powers are reserved to the states; and until such time as these wrongs are righted, we do hereby declare the decisions and order of the Su-

preme Court of the United States of May 17, 1954, and May 31, 1955, to be a usurpation of power reserved to the several states and do declare, as a matter of right, that said decisions are in violation of the Constitutions of the United States and the State of Mississippi, and therefore, are considered unconstitutional, invalid and of no lawful effect within the confines of the State of Mississippi;

We declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to void this illegal encroachment upon our rights, and we do hereby urge our sister states to take prompt and deliberate action to check further encroachment by the Federal Government, through judicial legislation, upon the reserved powers of all states.

The Governor of Mississippi is respectfully requested to transmit a copy of this resolution to the President of the United States, the Governor of each of the other states, and to the members of Congress and the Supreme Court of the United States.

Adopted by the Senate, February 29, 1956.

Adopted by the House of Representatives, February 29, 1956.

MISSISSIPPI CODE, SECTION 2046.5 (1956)

Business customers, patrons or clients—right to choose—penalty for violation.

1. Every person, firm or corporation engaged in public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty par-

lors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; provided, however, the provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

2. Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that "the management reserves the right to refuse to sell to, wait upon or serve any person," however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this act.

3. Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

4. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any rea-

son, such holding of unconstitutionality shall not affect any other portion of this act.

MISSISSIPPI CODE, SECTION 2056(7) (1954)

Conspiracy.

If two (2) or more persons conspire

.

(7) To overthrow or violate the segregation laws of this state through force, violence, threats, intimidation, or otherwise;

.

such persons, and each of them, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than twenty-five dollars (\$25.00), or shall be imprisoned not less than one month or more than six (6) months, or both.

MISSISSIPPI CODE, SECTION 4065.3 (1956)

Compliance with the principles of segregation of the races.

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be

and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 U.S. 483, 74 S. Ct. 686, 98 L. ed. 873) and of May 31, 1955 (349 U.S. 294, 75 S. Ct. 753, 99 L. ed. 1083), and to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public

schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof.



IN THE

Supreme Court of the United States

October Term, 1969

No. 79

SANDRA ADICKES,

*Petitioner,**against*

S. H. KRESS AND COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

against

S. H. KRESS AND COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT

Opinions Below

On March 14, 1966, the United States District Court for the Southern District of New York, after the completion of full discovery, ordered summary judgment with respect to petitioner's claim that respondent S. H. Kress and Company (hereinafter "Kress") had entered into a conspiracy to deprive petitioner, the plaintiff below, of her civil rights, finding that there was

"[N]o evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy."

The opinion (Honorable Dudley B. Bonsal, U. S. D. J.), reported at 252 F. Supp. 140 (S. D. N. Y. 1966), appears in the Appendix at A. 179.

On February 15, 1967, the United States District Court for the Southern District of New York (Honorable Charles H. Tenney, U. S. D. J.) entered an order and judgment

directing a verdict in favor of respondent on the ground that petitioner had failed to offer proof of a violation of the Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983 (hereinafter, "Section 1983") (A. 197).

On December 27, 1968, the United States Court of Appeals for the Second Circuit affirmed both decisions of the District Court, finding that

(a) there had been no proof of a violation of Section 1983; and

(b) the claim of conspiracy was unsupported by any facts tending "to suggest a conspiracy."

The opinion of the Court of Appeals, reported at 409 F. 2d 121 (2d Cir. 1968), appears at A. 201.

Jurisdiction

This Court granted *certiorari* on May 5, 1969, 394 U. S. 1011. Petitioner has invoked the jurisdiction of the Court under 28 U. S. C. §1254 (1) (Act of June 25, 1948, Ch. 646, 62 Stat. 928).

Questions Presented

1. Whether summary judgment dismissing a claim of conspiracy was proper where, after full discovery, petitioner produced no facts to support the alleged conspiracy and there was specific proof negating such a claim.

2. Whether the District Court correctly exercised its discretion in refusing to allow an amendment of the complaint to allege a claim under a statute, declared unconstitutional almost 90 years ago by this Court, where the statute had no applicability to the facts presented, irrespective of its constitutionality.

3. Whether in an action for damages, brought pursuant to 42 U. S. C. §1983 for failure to serve a person at a lunch counter, the courts below correctly ruled that there was no state action.*

4. Where witnesses were not previously specified in the pre-trial order, not identified until the day before trial, and their testimony was conceded by petitioner to be cumulative, did the District Court validly exercise its discretion in enforcing its Calendar Rules and precluding testimony of surprise witnesses.

The Court of Appeals unanimously affirmed the rulings of the District Court with respect to questions 1 and 4. The Appellate Court was divided, 2 to 1 (Waterman, J., dissenting), in affirming the trial court's order concerning question 3. The issue raised in question 2 was never presented to the Court of Appeals and it therefore was not ruled upon by that court. Accordingly, respondent submits that question 2 should not be considered by this Court.

Statutes and Rules Involved

The pertinent Statutes and Rules are:

Fourteenth Amendment to the Constitution

Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983;

Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335];

Rule 56, Federal Rules of Civil Procedure;

Rules 13 and 16, Calendar Rules of the United States District Court for the Southern District of New York.

* The phrase "state action" is used by the courts and in this brief as the equivalent of, and interchangeable with, "under color of state law." See e.g., *United States v. Classic*, 313 U. S. 299 (1941).

Statement of the Case

1. The Original Complaint

This action, commenced by the filing of a complaint on November 12, 1964, sought damages in the amount of \$550,000 from Kress for an alleged violation of Section 1983.

Briefly stated, the original complaint alleged, as a first cause of action, that on August 14, 1964, petitioner, a white person, accompanied six Negro students to the public library in Hattiesburg, Mississippi, where a request by the students to use the library facilities was refused and they were asked to leave. Petitioner and the students thereafter entered the local Kress store, where a waitress employed by Kress did not take petitioner's order while taking those of the Negro students.

The original complaint further charged, as a second claim, that after petitioner left the Kress store, she was arrested and jailed by officers of the Hattiesburg police department for vagrancy, pursuant to an alleged conspiracy between Kress and the Chief of Police of Hattiesburg.

2. Pre-Trial Proceedings

Following an answer in which respondent denied liability (A. 7-8), extensive pre-trial discovery was conducted. This included interrogatories submitted by both sides, the production of documents, and depositions of both petitioner and respondent's store manager (A. 9-118; 120-160). At the conclusion of this discovery, an uncontested note of issue was filed signifying that petitioner had completed all the discovery she deemed necessary to establish her case.

3. Summary Judgment

On November 29, 1965, respondent moved for summary judgment with respect to both claims of the original complaint.

(a) *The Conspiracy Claim*

Respondent, relying only on sworn testimony and affidavits,* submitted proof that the reason, and only reason, why petitioner was not served in the Kress store on August 14, 1964, was because of the imminent danger of violence. The store manager determined not to serve petitioner in order to avoid a riot and injury to her and her companions (A. 134, 136, 142, 150). This decision was shown to be totally unrelated to any alleged action by the State of Mississippi (A. 154-55). Respondent further submitted proof, in the form of sworn affidavits of members of the police force and of its Chief, as well as the testimony of respondent's store manager, to establish not only a total lack of conspiracy or even communication between respondent and the police, but, indeed, proof of animosity between them (A. 107, 110, 112, 154-155; 124-125). Respondent also relied upon petitioner's sworn statements that she had absolutely no knowledge of any connection or even communication between respondent and the police (A. 86; R. 717).

Petitioner offered no evidence to controvert this proof, but rather attempted to rely upon the mere sequence of events as alleged in the complaint and two unsworn, irrelevant statements (A. 177, 178).

* While petitioner attempts to question the District Court's granting of summary judgment by claiming it was based on unsworn statements (Petitioner's Brief, pp. 2, 7, 22, 44), such an assertion is simply not true. The only unsworn statements submitted to Judge Bonsal were proffered by petitioner and not respondent and, indeed, respondent objected to them. Further, there is nothing to indicate that Judge Bonsal relied on them in reaching his decision.

The court, based on respondent's proof and the total lack of any contradictory evidence submitted by petitioner, granted respondent's motion for summary judgment with respect to the conspiracy, finding that respondent's motion could not be defeated "on the mere hope that [petitioner] will be able to discredit these denials by cross-examination at trial" (A. 183).

(b) *The Refusal to Serve Claim*

Kress asserted that petitioner had failed to demonstrate any state action related to the refusal to serve petitioner and hence that summary judgment was proper. In opposition, petitioner sought to satisfy the state action requirement by alleging that the existence of certain enactments of the Mississippi legislature established state action, without any showing that these enactments were in any way enforced.

Judge Bonsal found that all the Mississippi enactments cited by petitioner were irrelevant, save Section 20465 of the Mississippi Code. Nonetheless, the court denied this portion of respondent's motion, holding that if petitioner could show that defendant discriminated against her pursuant to a custom enforced by the state, she would have established a proper cause of action (A. 182).

4. Petitioner's Motion to Amend

After respondent had moved for summary judgment, petitioner filed a cross motion seeking to make certain amendments to the complaint. The only amendment respondent opposed was an effort to add a claim based on Sections 1 and 2 of the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335], which had previously and repeatedly been declared unconstitutional by this Court.

The court rejected petitioner's attempt to introduce the unconstitutional Civil Rights Act of 1875 on the grounds

that, irrespective of constitutionality, on its face the Act did not apply to respondent (A. 183-184).

On March 29, 1966, petitioner served her First Amended Complaint, which included surplusage which Judge Bonsal had specifically ruled was irrelevant. Respondent moved to strike those portions of the complaint as prejudicial, which motion was granted, and on April 26, 1966, petitioner filed her Second Amended Complaint. In its Answer, respondent denied that petitioner had not been served because she was a white person in the company of Negroes (A. 188).

5. Pre-Trial Order

On December 9, 1965, more than a year and two months before trial, the District Court, acting pursuant to Rule 13 of its Calendar Rules, ordered the parties to exchange lists of witnesses and to file pre-trial memoranda setting forth "a list of witnesses which each party intends to call along with the specialties of experts to be called" (A. 119). In her pre-trial memorandum of June 28, 1966, petitioner designated herself and the six Negro students (A. 199).

On August 3, 1966, a pre-trial order was entered wherein petitioner agreed

"[T]hat the witnesses whom each party now intends to call, along with the specialty of experts to be called, are those listed in the memorandum heretofore filed. . . . Should any party hereafter decide to call any additional witnesses, *prompt* notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum . . . shall set forth the reason why the witness was not theretofore identified. . . . No witness may be called at trial unless identified in a pre-trial memorandum" (A. 195). (Emphasis the court's.)

The pre-trial order also stated and petitioner stipulated that

"(4) Kress issued a policy statement, on or about July 15, 1964, expressly prohibiting the refusal of service in its stores to anyone because of race, color or national origin.

"(5) The Kress Hattiesburg store maintained one set of eating facilities for its patrons since at least July 3, 1964. Prior to August 14, 1964, Kress had served Negroes at its luncheon counter in the Hattiesburg store.

"(8) The store contained 100 or more people, and people both inside and outside the store observed plaintiff and her group" (A. 191).

6. Exclusion of Surprise Witnesses

At a pre-trial conference held before the trial judge two weeks prior to trial, petitioner's counsel made no mention of any new witnesses. Nevertheless, on the very day before trial, petitioner served a paper entitled "Amendment to Pretrial Memorandum" which advised respondent for the first time of her intention to call an alleged expert witness to testify with respect to custom. The identity of a second proposed expert witness was not even contained in that Amendment, but was mentioned in passing in petitioner's trial memorandum served the same day (A. 227). In neither instance did petitioner comply with the District Court's requirement of stating the reason why the witness was not previously designated. Thus, despite two orders, entered fourteen months and six months before trial respectively, which required petitioner to give prompt notice of the identity of any witnesses, she did not do so until less than twenty-four hours before trial.

Petitioner's counsel admitted to the trial judge that her failure to inform respondent of the witnesses sooner

was due to the fact that she had taken absolutely no steps to secure any expert witnesses until after the final pre-trial conference (A. 229). Indeed, petitioner's counsel confessed that she had never met the proposed witnesses and did not know what their testimony would be (A. 295). Counsel stated that a postponement of the case would not have aided her since "on the date the case could be put over I could well not have had" the witnesses (A. 233). Finally, petitioner's counsel admitted that the witnesses would not have testified to anything more than what was already in the record (A. 293).

7. Trial Proceedings

The case was tried before the Honorable Charles H. Tenney and a jury commencing on February 14, 1967. The trial court, when apprised of the facts surrounding petitioner's attempt to introduce two surprise witnesses at the eleventh, or, indeed, twelfth hour, ruled that to allow these witnesses to testify would be highly prejudicial to respondent. Petitioner did not request an adjournment of the trial, since her counsel admitted that she could not know whether the witnesses would be available at a later time (A. 233).

Petitioner and three of the students who accompanied her testified. Petitioner related the facts of her presence in Mississippi, her teaching, the decision to attempt to integrate the library, and of the trip to Hattiesburg on August 14, 1964. She stated that all of the participants had decided to wear identical clothing, work blouses and skirts (A. 261), and admitted that the attempt to integrate the library was directly contrary to the instructions she had received from her superiors, since there was fear of violence. She further admitted that she was aware of instances of violence in Hattiesburg (A. 260-61).

Following the unsuccessful attempt to integrate the library, petitioner and her group, dressed alike and walking

in twos and threes, went approximately six blocks down the main street of the city to the Kress store, with a stop at the Woolworth store. The petitioner admitted that the group went to Kress because they knew that Kress served Negroes at its facilities. The decision to go to Kress was made at the last moment, and the group had no previous intention to do so (A. 261). Petitioner conceded that while walking down the street she observed "quite a number" of police around and 2 or 3 police cars (A. 263).

Petitioner entered Kress' store, which she agreed contained about 100 people (A. 191, 264). Petitioner noted that people in the aisle were staring at the group and that people outside were looking through the front windows at the group (A. 76). In this atmosphere, respondent's store manager instructed the waitress not to serve Miss Adickes, despite the fact, as previously noted, that Kress was known to be one of the stores in Hattiesburg which served both Negroes and whites in its store (A. 260).

The testimony of the three students was substantially the same, noting that Kress had a single set of eating facilities at which all were served and for which it had received nationwide publicity (A. 275-76, 282).

Respondent moved for a directed verdict at the close of petitioner's case. The trial judge ruled that petitioner had not established any relevant custom and usage (A. 321). The court went on to hold, however, that even assuming for the purpose of the motion that there was proof of such a custom or usage, plaintiff had failed to offer any proof in the record which showed that the custom or usage was enforced by the state. In short, there was absolutely no state action, and since this is the *sine qua non* for a claim under 42 U. S. C. §1983, the court directed a verdict in respondent's favor (A. 321-22).

Summary of Argument

After extensive discovery and upon a full hearing, the Honorable Dudley B. Bonsal, U. S. D. J., correctly granted summary judgment dismissing petitioner's unsupported and frivolous conspiracy claim. The court acted in view of the clear and convincing proof offered by respondent that there was no conspiracy and the total absence of any evidence by petitioner to the contrary. The Circuit Court was unanimous in its affirmance.

It is submitted that the District Court properly denied petitioner leave to amend her complaint to add a purported claim under the Civil Rights Act of 1875. While respondent contends that the question is not properly before this Court, since it was not raised in the Court of Appeals, it is clear on the face of the statute that the Act does not apply here. In addition, the Act has been declared unconstitutional, and as such is void.

The foundation for petitioner's remaining claim has been Section 1983—the "state action" statute. However, from the very outset, petitioner has failed to adduce any evidence whatsoever of the requisite state involvement in Kress' action, which is the touchstone under the Fourteenth Amendment to the Constitution. She relied solely on the *pro forma* existence of a forgotten and completely unenforced Mississippi statute, which merely restates the common law right of a restaurant owner to select his customers as he pleases. Nevertheless, Judge Bonsal, giving petitioner the greatest possible latitude, took a broad view of her case and ruled that she could recover under Section 1983 if she could show that respondent discriminated against her pursuant to a custom enforced by the state under the Mississippi statute (A. 182).

At trial, petitioner failed to prove the existence of a relevant custom which was enforced by the State of Missis-

issippi or that the state was in any other way involved, directly or indirectly, in the mere refusal of service by Kress. Accordingly, the trial court directed a verdict for respondent at the close of petitioner's case.

Respondent contends that the District Court was correct in holding that petitioner failed to make a *prima facie* showing of state action. The Mississippi statute, Section 2046.5, is on its face, a neutral enactment, which has never been enforced. In addition, petitioner did not in any way establish that respondent had acted pursuant to that statute. In short, Kress can in no way be said to have acted under color of any discriminatory statute or custom of the State of Mississippi. There simply was no rational nexus between state authority or power and Kress' private act so as to render Kress liable for money damages under Section 1983.

While petitioner might have sought injunctive relief under the Civil Rights Act of 1964, 42 U. S. C. §2000a *et seq.*, without having to prove state action, petitioner chose instead to seek more than half a million dollars in monetary damages under Section 1983, which requires state action. Petitioner should not be permitted to extrapolate from both statutes so as to receive large money damages without satisfying the basic state action requisite of Section 1983.

Finally, the District Court acted wisely, correctly, and certainly within its proper discretion, in excluding petitioner's two surprise witnesses, whose testimony would have been merely cumulative and of no probative value.

ARGUMENT**POINT I**

Summary judgment was correctly granted where there was no proof of conspiracy.

The gravamen of the second claim in the original complaint was the charge that there was a conspiracy between Kress and the Chief of Police of Hattiesburg to have petitioner refused service in Kress' store and later to be arrested by the police. These allegations are, it is submitted, pure fantasy. Even after the completion of extensive discovery and the filing of an uncontested note of issue signifying that petitioner had assembled all of the facts she deemed necessary to establish her case, petitioner failed to produce a shred of evidence to support that charge. Petitioner having failed to prove a *prima facie* case, the courts below unanimously held that Kress was entitled to summary judgment on this issue. See *Scolnick v. Lefkowitz*, 329 F. 2d 716 (2d Cir.), *cert. denied*, 379 U. S. 825 (1964).

A. The Facts

The conspiracy alleged, was claimed to have involved three specific acts:

(1) the refusal of the librarian to let the Negro students use the library;

(2) the arrest of petitioner by the police on the streets of Hattiesburg on a charge of vagrancy; and

(3) the refusal of Kress to serve petitioner.

Each of these events and the evidence relating to them will be dealt with separately to make it clear that not only

was there no proof of a conspiracy in the record but that the uncontested facts actually established that no conspiracy existed. There was not a scintilla of evidence which could properly have been sent to a jury and since the court would have been required to direct a verdict for respondent at the close of petitioner's case, summary judgment was proper. *Morgan v. Sylvester*, 125 F. Supp. 380 (S. D. N. Y. 1954), *aff'd*, 220 F. 2d 758 (2d Cir.), *cert. denied*, 350 U. S. 867 (1955).

1. *The Library*

This is probably the most far-fetched charge of the three made by the petitioner in the courts below. To claim, in view of the record, that the incident at the library was connected with any "conspiracy" is preposterous.

Petitioner and the six Negro students planned, prior to August 14th, to integrate the Hattiesburg public library (A. 65-67). There was no claim that anyone in Kress knew this at any time prior to the day in question and the evidence demonstrated the contrary (A. 86; 154). The group arrived at the library and the Negroes sought the use of the facilities, which was denied by a librarian whose name is known to neither petitioner nor Kress. The librarian requested that the group leave and the students refused. The librarian thereupon called the Chief of Police who, on arrival, ordered the library closed (A. 68-70).

The evidence was clear and uncontradicted that Kress had no connection with, or knowledge of, any of the events at the library. The testimony of Mr. Gordon T. Powell, Kress' store manager, was emphatic in this regard,* and

* "Q. Mr. Powell, did you ever discuss Miss Adickes, or anyone in her group, with anyone employe[d] at the Hattiesburg public library? A. No.

Q. Do you even know anyone employed at the Hattiesburg public library? A. No.

(footnote continued on next page)

made incontestable by the deposition testimony of Miss Adickes.**

The complete absence of any evidence to support petitioner's charge was further documented by her answers to interrogatories propounded by Kress wherein petitioner was asked to state the name of each employee of Kress claimed to have caused the refusal at the library and the manner in which the refusal was caused. After a series of nonresponsive answers, Kress finally obtained the following statements, which petitioner has never changed or supplemented:

"Plaintiff claims that an officer, director of [sic] employee of Kress refused, cooperated or caused

(footnote continued from previous page)

Q. Did you know, as of the time Miss Adickes came into your store on August 14th that she, or anyone else had been to the Hattiesburg library at any time to integrate the facilities? A. No.

* * *

Q. Did you agree with any public official in Hattiesburg, or the state of Mississippi, to deny Miss Adickes or anyone in her group the use of the Hattiesburg public library facilities? A. No." [A. 154-55]

** "Q. Miss Adickes, do you have any knowledge of any communication between Kress or any of its officers or directors or employees, with anyone connected in any way with the Hattiesburg Public Library? A. No, I have no knowledge, no direct knowledge.

Q. No what? A. No direct knowledge.

Q. Do you have any knowledge? A. No.

Q. During the entire course of time that you were in or about the Hattiesburg Public Library, did anyone say anything about or mention the names of Kress or any of its officers or employees? A. No.

* * *

Q. Do you have any knowledge of any communication between Kress or any of its officers, directors or employees, with any public official of the City of Hattiesburg? A. No.

Q. Or of the State of Mississippi? A. No.

* * *

Q. Do you have any knowledge at the time you went to the Kress Store on August 14, 1964, that any employee of Kress was even aware of the alleged events at the library? A. No." [A. 86]

in some manner, the details of which are unknown to her, the refusal of library facilities to plaintiff and her companions.

"Plaintiff has no knowledge at this time of the names of any such officer, director or employee nor does she presently have any knowledge as to the manner in which said refusal was caused." (Emphasis supplied.) (A. 115)

The sum total of this evidence was the uncontroverted fact that Kress was not even aware of the happenings at the library, much less did it discuss the events with anyone at the library or the police; certainly it was not a party to a "conspiracy." Indeed, petitioner confessed a total absence of any information, be it even hearsay or rumor, concerning any "conspiracy" relating to the library. The record was clear that not only did petitioner adduce no evidence to support her claim, but the uncontroverted evidence showed that there was no "conspiracy" relating to the library. In such circumstances, the claim was patently sham and should not have been permitted to stand.

2. The Arrest

Petitioner further claimed that she was arrested pursuant to this illusory conspiracy. Here too, she failed to produce any facts to support the allegations and the record belies such an assertion.

Kress asked petitioner, in interrogatories, to state the manner in which she claimed Kress caused her arrest and the name of the person or persons who so acted. After much travail, petitioner finally admitted that:

"Plaintiff has no knowledge as to the manner in which Kress caused plaintiff's arrest. Plaintiff has

no knowledge at this time of the name, address or occupation of the person who caused the arrest, except that, upon information and belief, such person was employed by or acted on behalf of Kress."
(Emphasis supplied.) (R. 717)

This was further enforced by petitioner's own deposition testimony admitting that she had no knowledge supporting the claim that Kress conspired with the police:

"Q. Do you have any knowledge of any communication between Kress or its officers, directors or employees, with any member of the Hattiesburg Police Department or any officer of the police department? A. No.

"Q. Did any officer, director or employee of Kress make any statement to you or anyone else to your knowledge which in any way mentioned the Hattiesburg Public Library or the Hattiesburg Police Department? A. No.

"Q. Did any member of the Hattiesburg Police Department or any other public official of Hattiesburg make any statement to you or anyone else, to your knowledge, which in any way related to Kress or any of its officers, directors or employees? A. No" (A. 86).*

In sum, petitioner conceded a total absence of any evidence of a conspiracy between Kress and the police. Petitioner alleged that the arrest was conspiratorial but came

* This is, of course, contrary to the wholly unsupported charge (Petitioner's Brief, p. 4) that petitioner was arrested because of her request for service. There is not a shred of proof that would lead to this unwarranted conclusion.

forth with not an iota of proof to support such a charge. Not only did petitioner admit that she had no facts, but her own testimony negated any possible trace of an inference. Petitioner testified that upon leaving the library and while going to Woolworth's, before she even decided to go to Kress—

"I had been aware of police around us from the moment we left the library."

"A. I am not saying the car followed us [the Chief of Police's car] but we were aware of the presence of police.

"Q. You saw policemen about? A. Yes, yes.

"Q. Did you see any in the Woolworth Store? A. I think there was one right outside.

"Q. Did you see the particular police car, the chief of police's car again? A. No.

"Q. Or any police car? A. I saw police cars, yes.

"Q. In front of Woolworth's or about Woolworth's? A. Nearby, yes, I remember they were nearby.

"Q. Approximately how many police would you say you saw about in the Woolworth's vicinity? A. When I was in the store I have a recollection of seeing one outside the store.

"Q. As you left the Woolworth store did you notice a police car? A. Yes, there were police, quite a number of them all around.

"Q. All around the Woolworth store? A. Yes. There weren't a lot of cars, but there were a lot of policemen around" (A. 72).

Thus, the police had been about Woolworth's and in the streets before petitioner went to Kress. In light of this, it is not surprising that petitioner could not produce any proof that Kress had called the police or had anything to

do with her arrest; the simple fact is that it didn't. At the deposition of Mr. Powell, the Kress store manager, where petitioner had full opportunity to cross-examine, it was conclusively established that there was not even the slightest thread of connection between the Hattiesburg Police and defendant. It is hard to imagine a more searching examination with more negative results for the petitioner.*

* "Q. Did any police official call on August 14th or 15th, 1964, concerning Miss Adickes? A. No.

"Q. Did you call any police official during the month of August 1964 regarding Miss Adickes? A. No.

* * *

"Q. When did you first become aware that Miss Adickes had been arrested? A. That afternoon or evening, when I arrived home and looked into the Hattiesburg American, the local newspaper. It had a story in there about the library incident, and, from reading this, I found out she had been arrested. (A. 148)

* * *

"Q. Did you on August 14th, or any time prior thereto, have any discussions with any member of the Hattiesburg police department concerning Miss Adickes? A. No.

"Q. Or concerning any Civil Rights worker? A. No.

"Q. Did you have any discussion on August 14, 1964, or at any time prior thereto, with any member of the Hattiesburg Police Department concerning the Kress policy of serving both negroes and whites? A. No.

* * *

"Q. Did you have any conversation with anyone on or before August 14th relating to the arrest of Miss Adickes? A. No.

"Q. Did you or anyone else in Kress, to your knowledge, request that the police come to this Kress store on August 14th? A. No.

"Q. Did you, or anyone else, to your knowledge, in Kress, ask the police to arrest Miss Adickes? A. No.

"Q. Did you know that the police were coming to arrest Miss Adickes on August 14th? A. No, I did not.

* * *

"Q. Did you agree with anyone in Hattiesburg, any public official or State official, to have Miss Adickes arrested on August 14, 1964? A. No, I did not.

"Q. Did you agree with any Hattiesburg official or State official to refuse service to Miss Adickes on August 14, 1964? A. No." (A. 154-55)

Furthermore, the affidavits of the police officers who arrested petitioner made it clear that the arrest was not pursuant to any conspiracy with Kress, but was rather due to the independent action of the officers. The officers swore that

"[t]his arrest was made on the public streets of Hattiesburg, Mississippi, and was an officer's discretion arrest. I had not consulted with Mr. G. T. Powell, Manager of S. H. Kress and Company in Hattiesburg, and did not know his name until this date. No one at the Kress store asked that the arrest be made and I did not consult with anyone prior to the arrest" (A. 110, 112).

The Chief of Police corroborated this, stating that "Mr. Powell had made no request to me to arrest [Miss] Sandra Adickes or any other person . . . Mr. Powell and I had not discussed the arrest of this person until the day of this statement and we had never previously discussed her in any way" (A. 107). The uncontradicted proof is, therefore, that whatever reasons the police had for the arrest, it was never, in any way, discussed with, requested by or even known to Kress.

The affidavits offered by respondent were never rebutted. Petitioner made no attempt to do so, and even now does not claim that there were any additional available facts. Cf. *Robin Construction Co. v. United States*, 345 F. 2d 610, 613-14 (3rd Cir. 1965); *Schneider v. McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (2d Cir. 1958). Instead, petitioner complains, "respondent should not have been permitted to rely upon the *ex parte* affidavits of the police officers and the Chief of Police. . . ." (Petitioner's Brief, p. 45). This ignores the fact that affidavits are perfectly proper under Rule 56 and that once a party moving for summary judgment comes forth with a sufficient showing of uncontested facts, the burden shifts to the opposing party to establish, by proper means, a genuine

material issue for trial. *Scolnick v. Lefkowitz*, 329 F. 2d 716 (2d Cir.), *cert. denied*, 379 U. S. 825 (1964).

Petitioner decided not to do this, but rather to rely upon the mere allegations of the original complaint (Petitioner's Brief, p. 45).^{*} Having made this choice, petitioner now seeks to avoid the consequences. The District Court granted summary judgment not merely, as petitioner suggests, upon the facts shown by Kress, but upon the total absence of any proof to the contrary. While perhaps a plaintiff can file a complaint based on nothing more than conjecture or suspicion, when faced with a summary judgment motion, after full discovery, plaintiff must produce some facts and cannot continue to rely on mere "hunches." *Waldron v. Cities Service Co.*, 361 F. 2d 671 (2d Cir. 1966), *aff'd sub nom. First Nat. Bank v. Cities Service Co.*, 391 U. S. 253 (1968). Thus, the simple expedient of alleging "conspiracy" cannot forestall judgment indefinitely. Where a plaintiff simply has no proof, such as here, summary judgment is required. See, *Doff v. Brunswick Corp.*, 372 F. 2d 801 (9th Cir. 1966), *cert. denied*, 389 U. S. 820 (1967).

3. The Refusal of Service

While Kress does not deny that petitioner² was refused service, it does strongly deny that such refusal was "con-

^{*} Petitioner now claims that a conspiracy "can, without more, be inferred from the sequence of events" (Petitioner's Brief, p. 45). In this connection petitioner points to the fact that a policeman entered Kress while she was present. However, as petitioner knows, this is a slender reed upon which to rely. Petitioner's sworn testimony states that from the moment she left the library the police followed her (A. 72-73). Further, even according to the testimony of petitioner's own witnesses (which petitioner never tendered on the summary judgment motion), the policeman did nothing but look at the group, walk to the back and leave (A. 302-03). Since the proof is clear that Kress did not know of the library incident or call the police, to fabricate a case upon the entry of a police officer into the Kress store is fantastic.

spiratorial" or was based upon race, color or creed. Indeed, Kress was a leader in civil rights in the South and had made certain that its facilities were available to all (A. 104-06; 275-76). In fact, it was for just this reason that petitioner and the students came to Kress (A. 260).

Mr. Powell candidly testified that the only reason he refused Miss Adickes service was because "of the very explosive atmosphere that was in the store at that time" (A. 142). He said:

"... quickly I just made up my mind to avoid the riot, and protect the people that were in the store, and my employees, as far as the people in the mob who were going to get hurt themselves. I just knew that something was going to break loose there" (A. 134).

Indeed, the deposition of Mr. Powell is replete with statements showing that his was a unilateral refusal to serve Miss Adickes, triggered solely by his fear for her safety and that of her companions and the other customers in the store (A. 136). It was completely unconnected, in any way, with the Chief of Police of Hattiesburg, or, indeed, any other official (A. 154-55).

The statements of the police officers who arrested Miss Adickes and of the Chief of Police confirm this, stating that they "did not even know" Mr. Powell until three months after the incidents alleged. Under these circumstances, it is clear that the police had nothing to do with, were not consulted by, and weren't even aware of Mr. Powell's decision not to serve Miss Adickes.

To controvert this, petitioner failed to come forward with even a fragment of proof to show a conspiracy be-

tween Kress and anyone.* The two lower courts properly refused to permit petitioner's vague unsupported allegations to serve as a substitute for the hard facts which Kress assembled, particularly since petitioner admitted that she had absolutely no knowledge of any communications between Kress and the police of Hattiesburg.

"Q. Do you have any knowledge of any communication between Kress or its officers, directors or employees, with any member of the Hattiesburg Police Department or an officer of the police department? A. No" (A. 86).

Here too, it is beyond doubt that petitioner's claims were totally unsubstantiated and called for the granting of summary judgment. *Waldron v. British Petroleum Co.*, 38 F. R. D. 170 (S. D. N. Y. 1965), *aff'd sub nom. Waldron v. Cities Service Co.*, 361 F. 2d 671 (2d Cir. 1966), *aff'd sub nom. First Nat. Bank v. Cities Service Co.*, 391 U. S. 253 (1968).

B. The Law

The issue is whether, based upon the record, petitioner can be said to have shown the existence of any genuine issue of material fact which was sufficient to defeat the motion for summary judgment. *Schwartz v. Musicians*

* Petitioner strains to create an issue through her repeated assertions that respondent offered unsworn statements in support of the motion (Petitioner's Brief, pp. 2, 7, 22, 44). Actually, it was petitioner who offered these statements, and respondent objected to their use.

In any event, the statements are irrelevant. Even petitioner, who relies on the statements, does not argue that they were probative with respect to the claimed conspiracy, but only that they "did not corroborate" Kress' position (Petitioner's Brief, p. 44). Any attempt to create an issue out of these statements is specious, since they are innocuous on their face, and such unsworn statements are totally improper and inadmissible on a motion for summary judgment. *Cf. Mahoney v. McDonald*, 38 F. R. D. 161 (E. D. Pa. 1965).

Local 802, 340 F. 2d 228, 232 (2d Cir. 1964). While Kress had the initial burden of proving sufficient uncontested facts demonstrating that summary judgment was appropriate, once Kress satisfied its burden, petitioner was obliged to set forth specific facts, establishing that there was a genuine material issue for trial. *Scolnick v. Lefkowitz*, 329 F. 2d 716 (2d Cir.), *cert. denied*, 379 U. S. 825 (1964); *Rowe v. Harris*, 195 F. Supp. 310 (W. D. Ark. 1961).

The fact that petitioner saw fit to call this a "conspiracy case" cannot save her from the granting of a motion for summary judgment. Although it is true that the complaint and the allegations thereunder were to be construed liberally, *Morgan v. Sylvester*, 125 F. Supp. 380 (S. D. N. Y. 1954), *aff'd*, 220 F. 2d 758 (2d Cir.), *cert. denied*, 350 U. S. 867 (1955), that in itself is not enough to evade a motion for summary judgment. For while it is easy for a disgruntled plaintiff to state a conclusion, and even believe that those responsible for a real or imagined injustice were guilty of the rankest kind of malice, he cannot go to trial in any case, even a Civil Rights Act case, solely on the basis of speculative beliefs and the unreasonable inferences sought to be drawn from the record. *Pugliano v. Staziak*, 231 F. Supp. 347 (W. D. Pa. 1964), *aff'd*, 345 F. 2d 797 (3rd Cir. 1965).

"To defeat a movant who has otherwise sustained his burden within the principles enunciated above, the party opposing the motion must present facts in proper form—conclusions of law will not suffice; and the opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, nor merely suspicions." 6 Moore, Federal Practice (2d ed., 1953) ¶56.15[3], p. 2131." *Boyce v. Merchants Fire Insurance Co.*, 204 F.

Supp. 311, 313 (D. Conn.), *aff'd*, 308 F. 2d 806 (2d Cir. 1962).

Nor can petitioner continue to try to hide behind the claim that conspiracies are difficult to prove. Such a claim ignores the fact that extensive pre-trial proceedings were held and that petitioner could still offer no evidence of a fact from which a reasonably-minded person could draw an inference of conspiracy. *Waldron v. Cities Service Co.*, *supra*; *Morgan v. Sylvester*, *supra*. Further, summary judgment will not be denied on the mere hope that something will turn up on trial to enable a party to discredit, in some way, the movant's evidence. *Dyer v. MacDougall*, 201 F. 2d 265 (2d Cir. 1952); *Holdeen v. United States*, 186 F. Supp. 76 (S. D. N. Y. 1960).

Thus, the District Court was correct when it found

"no evidence in the complaint or in the affidavits or other papers from which a 'reasonably-minded person' might draw an inference of conspiracy. . . . The plaintiff may not defeat defendant's motion for summary judgment on the mere hope that she will be able to discredit these denials by cross-examination at trial" (A. 182-83).

All three of the judges in the Court of Appeals voted to affirm the trial court on this issue, bluntly concluding that

"Plaintiff's claim was wholly conclusory; she alleged no facts that would tend to suggest a conspiracy; and the chances of her proving such a conspiracy at the trial were nil" (A. 210).

POINT II

The Civil Rights Act of 1875 is inapplicable to this action.

More than a year after the filing of the complaint, and only after respondent had moved for summary judgment, petitioner sought to amend the complaint to add a claim under Sections 1 and 2 of the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335]. Petitioner's counsel conceded that such an amendment was based upon "a very way-out theory" (A. 298), since that statute had previously been declared unconstitutional. The District Judge, exercising his discretion under Rule 15 of the Federal Rule of Civil Procedure, denied the motion (A. 183-84). Petitioner never raised the issue again and failed to claim any error before the Court of Appeals. Accordingly, that court did not rule on this specific contention and the only holding is that of Judge Bonsal.

Where, as here, an issue was not raised in the Court of Appeals, this Court will not review the question, unless it is a most exceptional case. *Lawn v. United States*, 355 U. S. 339, 362-631, n. 16 (1958); *Duignan v. United States*, 274 U. S. 195, 200 (1927); *Husty v. United States*, 282 U. S. 694, 701, 702 (1931). Since there are no exceptional circumstances here, petitioner's claim is not properly before this Court for decision, and should not be considered.

While petitioner has tried to induce this Court to consider the theory that Sections 1 and 2 of the Act can be reenacted by judicial action, that issue need not be decided because the Act has no application here in any event. Section 1 of the 1875 Act grants

" . . . full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns,

public conveyances on land or water, theaters, and other places of public amusement. . .

Section 2 provides not only for a civil action by any person aggrieved under the law to recover \$500.00 in damages, but also for criminal penalties in the form of fines and incarceration for a period of up to a year.

The Act does not apply to the instant case because, as the District Court held, not even the broadest interpretation of "inns" as used in the 1875 Act could encompass respondent's lunch counter (A. 183-84). See also *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845, 847 n. 1 (4th Cir. 1959) and Nimmer, "A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875", 65 Col. L. Rev. 1394 at pp. 1396-1397 (1965) and cases cited. As petitioner's brief clearly points out (pp. 41-42), the word "inn" refers to a public house which offers *lodging* and accommodations for *travellers*. See also discussion, pp. 34-36, *infra*, and Virginia Commission on Constitutional Government, *The Reconstruction Amendments Debates*, at 711, 720, 727, 738 (1967). The Civil Rights Act of 1964 sets forth the distinction between "inns" and restaurants or lunch counters as follows:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests. . . .

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station. . . ." 42 U. S. C. §2000a.

Though both of these categories are subject to liability under the 1964 Act,* the Act draws a clear distinction between inns, which are mentioned in the 1875 statute, and restaurants and lunch counters, which are not covered.

Since it is clear from the language of the statute that it would not apply to Kress' lunch counter, the District Court was correct in ruling that there was no need to decide the question of the constitutionality of the 1875 Act (A. 185). When this is coupled with petitioner's abandonment of this issue in the Court of Appeals, the point becomes nugatory. Under these circumstances this Court has traditionally refrained from deciding constitutional questions, *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346 (concurring opinion, Brandeis, J.) (1936).

However, if the Court is nonetheless to consider petitioner's theory, the claim is still without merit. Shortly after its enactment, the 1875 statute was declared unconstitutional by this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883). In 1913, this Court again adjudged the statute to be altogether invalid in *Butts v. Merchants & Miners Transportation Co.*, 230 U. S. 126 (1913).

Despite these clear holdings, petitioner nevertheless attempts to conjure up authority for the proposition that the statute has somehow been revived by this Court's decisions in *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241 (1964) and *Katzenbach v. McClung*, 379 U. S. 294 (1964), which, of course, did not relate to this statute,

* The Civil Rights Act of 1964 clearly extends to much more inclusive categories of public places than the 1875 Act and provides for sweeping injunctive relief against discriminatory treatment in any such places. The 1875 Act, on the other hand, merely enables a private party to bring a civil suit to recover \$500.00. Under these circumstances, it is not surprising that Congress has not attempted to reenact the old 1875 statute with its narrower application.

but to Title II of the Civil Rights Act of 1964 (42 U. S. C. §2000a *et seq.*). See, Nimmer, *supra*.

Two different Circuit Courts of Appeals have been asked to rule on the theory, now advanced by petitioner, that the 1875 statute can somehow be revalidated. Both courts found the theory to be specious. The Fourth Circuit refused to entertain a claim based on the 1875 statute where a privately-owned restaurant had refused to serve a person because of his race, *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959). Likewise, when the District of Columbia Circuit considered this long moribund statute, it concluded that "Sections 1 and 2 of the Civil Rights Act of 1875 have no present validity." *Williams v. Hot Shoppes, Inc.*, 293 F. 2d 835, 837 (D. C. Cir. 1961), *cert denied*, 370 U. S. 925 (1962).

Though the statute has not been expressly repealed by Congress, it does not appear in the United States Code, and certainly the unqualified and definite holdings of the statute's unconstitutionality by this Court and by lower federal courts have effectively removed it from operative law. An unconstitutional statute, though having the form and name of law, is in reality no law, and is wholly void and ineffective. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137 (1803). Since unconstitutionality dates from the time of enactment, and not merely from the date of the decision branding it unconstitutional, an unconstitutional act is as inoperative as if it had never been passed. As this Court stated in *Chicago, Ind. & L. Ry. Co. v. Hackett*, 228 U. S. 559, 566 (1913), a statute which has been declared unconstitutional is

"as inoperative as if it had never passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing law. *Norton v. Shelby County*, 118 U. S. 425, 442; *Ex parte Siebold*, 100 U. S. 371, 376."

Petitioner's theory flaunts the very genesis of constitutional jurisprudence. There has never been any doubt that legislation under the constitution is either valid or it is void and no amount of semantics can change that. See, *Marbury v. Madison*, *supra*. Without regard as to whether the Congress could validly reenact the 1875 statute, the simple fact is it has not done so. In 1964 the Congress passed a new Civil Rights Act ignoring the old 1875 statute. This Court has acknowledged that it does not exercise revisionary power over the acts of Congress, *Muskrat v. United States*, 219 U. S. 346 (1911), and respondent respectfully urges that this Court should not now legislate where the Congress has declined to do so.

POINT III

The District Court was correct in holding that petitioner did not meet the state action requirement of 42 U. S. C. §1983.

In this action, where petitioner claims a denial of her civil rights because of a refusal of service, the indispensable element for damages under 42 U. S. C. §1983 is that the defendant act "under color of any statute, ordinance, regulation, custom, or usage" of the state. Section 1983 is a Reconstruction Era statute based upon the Fourteenth Amendment, which, of course, specifically and repeatedly limits itself to actions of the state. Thus, Section 1983 does not grant a cause of action for injury resulting from mere private actions * but rather requires proof of

* It was this gap in the application to individuals which led Congress to pass the Civil Rights Act of 1964, 42 U. S. C. §2000a *et seq.* See *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241 (1964). Here, however, petitioner has not sought the relief of that statute, but rather damages in excess of half a million dollars.

the existence of some "state action." See *e. g. Monroe v. Pape*, 365 U. S. 167 (1961). This requirement was recognized as early as the *Civil Rights Cases*, 109 U. S. 3, 17 (1883):

"[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual. . . ."

To establish state action under Section 1983, petitioner must show that "to some significant extent the State in any of its manifestations has been found to have become involved" in respondent's alleged discrimination. *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722 (1961). There must have been some implementation of the private discrimination by the state's use of its legal powers, *Shelley v. Kraemer*, 334 U. S. 1 (1948), the crucial test being whether state power "has in fact been exercised." *New York Times v. Sullivan*, 376 U. S. 254, 265 (1964). As was more recently stated in *Elders v. Consolidated Freightways Corp.*, 289 F. Supp. 630, 633-34 (D. Minn. 1968):

"In order for an act to be done under color of state law it is necessary that there be 'a vesting of actual authority of some kind,' in the actor. . . . It is not enough that the defendant exercises some power possessed only by virtue of his private citizenship. . . . Rather the acts must be such as are a manifestation or an alloy of the power of the state, and possible only because the defendant has been somehow dressed with that power. To some extent the state itself must be involved, or the

alleged wrongdoer must be acting under its authority or wielding a power of the sort commonly attached to the state." [Emphasis the court's].

See also, *United States v. Classic*, 313 U. S. 299, 326 (1941). Only by "sifting facts and weighing circumstances" of the particular case can a court make a determination as to the existence or nonexistence of state action. *Burton v. Wilmington Parking Authority*, *supra* at 722.

A. Respondent's Refusal of Service Was Not Under Color of State Law

Petitioner first attempts to prove the requisite state involvement by relying on three Mississippi statutes and a legislative resolution. The Court of Appeals affirmed the District Court's decision that two of these statutes and the resolution were not only totally irrelevant to the instant case, but were highly prejudicial as well, and should have been stricken from the complaint (A. 185).^{*} Such a ruling was well within the court's discretion and should now be affirmed. See, *e.g.*, *Paul M. Harrod Co. v.*

^{*} The Court of Appeals stated:

"It is true that in 1956 the Mississippi legislature passed, . . . Mississippi State Senate Concurrent Resolution No. 125 condemning and protesting the Supreme Court's school integration cases (*Brown v. Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955)), and a resolution, found in Miss. Code §4065.3, directing the entire executive branch of government and all persons responsible thereto, including the police, to give effect to the Senate Concurrent Resolution, described as the 'Resolution of Interposition.' See also Miss. Code §2056(7), a broad conspiracy statute passed in 1954 which, *inter alia*, makes it a crime to overthrow or violate the segregation laws of the state. However, these 1956 enactments are clearly insufficient by themselves to prove that in 1964 Mississippi had a custom of separating the races in restaurants. *Williams v. Howard Johnson's Inc.*, 323 F. 2d 102, 106 (4th Cir. 1963); Comment, 50 Cornell L. Q. 473, 494 (1965)" (A. 206).

A. B. Dick Co., 194 F. Supp. 502 (N. D. Ohio, 1961); *Moore v. Prudential Ins. Co. of America*, 166 F. Supp. 215 (M. D. N. C. 1958); see also, *Renshaw v. Renshaw*, 153 F. 2d 310 (D. C. Cir. 1946).

Faced with the obvious inapplicability of these enactments to this case, petitioner has fabricated the argument that their mere existence constitutes a basis for monetary damages against Kress, whether it knew of or relied upon these enactments or not. Petitioner has cited no authority, and there is none, to support such a novel proposition. This lack of authority is not surprising since the theory is in contravention of any basic concept of fair play, as it would automatically make Kress liable for acts in which it did not participate and had no say.

Moreover, petitioner's assertion flies in the face of the plain language of Section 1983 which requires that in order to be liable, a person must have acted "under color of" law. These key words, the language of the Fourteenth Amendment itself, and the cases for almost one hundred years make it clear that the basic prerequisites for liability under this section are knowledge of, and action taken pursuant to, state law.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U. S. 299, 326 (1941).

The third statute relied upon by petitioner, Section 2046.5 of the Mississippi Code (A. 173-74), provides that a business, including a restaurant, may

"choose or select the person or persons he or it desires to do business with, and . . . refuse to sell to, wait upon or serve any person that the owner, manager, or employee of such public place

of business does not desire to sell to, wait upon or serve. . . ."

The statute also provides that anyone who is requested to leave but refuses to do so is guilty of trespass. Here, of course, petitioner was not requested to leave the store nor was she ever charged with a trespass; thus, this provision had no applicability here.*

Section 2046.5 does not require or enforce segregation. It is merely a neutral, colorless statute which provides that a restaurant owner may choose such customers as he pleases. In fact, this amounts to no more than a restatement of the ancient common law principle that a restaurant owner who does not offer lodgings to travelers may accept some customers and reject others, on personal or indeed any grounds, there being no duty to serve all customers. As the Court of Appeals held, it is clear that at common law a restaurant owner, unlike an innkeeper, was free to select patrons on any basis deemed satisfactory to him, 21 Halsbury's *Laws of England*, §941, p. 447 (3rd ed. 1957) (A. 209).

Respondent respectfully contends that Judge Waterman's dissent missed the essential point of the common law rule (A. 222-23). The innkeeper's duty arose from a desire to insure that the wayfarer would not be forced to spend the night unsheltered, at the mercy of the elements and other dangers. Thus, when a person held himself out as one who would aid travelers and offer them lodging, he could not then refuse those away from home the protection of his house, for

* Petitioner's irrelevant reference to *Achtenberg v. Mississippi*, 393 F. 2d 468 (5th Cir. 1968), is simply a bootstrap attempt to raise issues that do not exist. That opinion reveals arrests for vagrancy, not trespass, which were totally unrelated to Kress. There was no proof and no finding that those arrests were related to Kress.

“ . . . if an innkeeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way. . . .” 3 Blackstone, Commentaries, 164 (Lewis ed. 1902) at 166. (Emphasis added.)

Thus, a victualler, who does not furnish lodging, such as a restaurant owner (Tidswell, *The Innkeeper's Legal Guide*, p. 22 (1864)), is entirely distinct from an innkeeper, who by furnishing accommodations takes on a heavy duty. *Orchard v. Bush & Co.*, [1898] 2 Q. B. 284; *Thompson v. Lacy*, 3 B. & Ald. 283 (K. B. 1820). This proposition was well stated in *R. v. Rymer*, [1877] 2 Q. B. 136 at 139, 140, to which Judge Waterman referred, where the court held that:

“The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate entrance, and appears to have been a mere shop in which spirits are retailed across the counter. . . . Such a place is not an inn within the meaning of the common-law-rule. An inn is a place ‘instituted for passengers and way-faring men.’ *Calye's Case*. A tavern is not within the definition. In such a place as this no one has a right to insist on being served any more than in any other shop.”

See, also, *Carpenter v. Taylor*, 1 Hilt. [N. Y.] 193, 195 (1856); *Ultzen v. Nicols*, [1894] 1 Q. B. 92; Beale, *Innkeepers and Hotels*, §35, p. 26 (1906).

There being no statutory provision to the contrary, the common law rule is in effect in Mississippi. *City of Jackson v. Wallace*, 189 Miss. 252, 196 So. 223, 225 (1940); *Western Union Telegraph Co. v. Goodman*, 166 Miss. 782,

146 So. 128 (1933). As the court stated in *State v. Brown*, 195 A. 2d 379, 382 (Del. 1963);

"In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant . . . has the right to select the clientele he will serve, and to make such selection based on color, race or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law."

To the same effect, see, *e. g.*, *Williams v. Howard Johnson's Inc.*, 323 F. 2d 102 (4th Cir. 1963); *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773 (1944); *Davidson v. Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967 (1918).

While Section 2046.5 provides that a restaurant owner may call upon proper law enforcement officials to enforce his decision not to accept certain customers, this too is nothing more than a restatement of the common law. Indeed, without this enforcement, the right to select customers is rendered meaningless. The storekeeper would either be at the mercy of the trespasser or forced to resort to his own physical strength or dangerous weapons to preserve his rights, which is exactly what trespass laws were designed to avoid. See 2 Pollack and Maitland, *The History of English Law*, 31, 41 (2d ed. 1909). To force the storekeeper to make such a choice is, in reality, to give him no alternative. The common law did not create a right without a remedy and Section 2046.5 does nothing more than confirm that basic principle. Cf. *Bell v. Maryland*, 378 U.S. 226, 328 (dissenting opinion) (1964); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. Md.), *aff'd*, 284 F. 2d 746 (4th Cir. 1960).

A statute such as Section 2046.5, which merely restates existing common law rights, is clearly insufficient state involvement to give respondent's action the color of state law. *Harrison v. Murphy*, 205 F. Supp. 449, 453 (D. Del. 1962); *State v. Brown*, *supra*. In order to prove that respondent acted under color of state law, petitioner must point to some positive provision of state law requiring or encouraging the segregation of public eating places. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959). In that case, which is strikingly similar to the instant situation, plaintiff, a Negro who had been excluded from defendant's restaurant, argued that while no state statute compelled segregation in restaurants, the acquiescence of the state in discriminatory customs of the people of Virginia supplied the necessary state action. The court flatly rejected this argument (p. 847) because it

"fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of a state in accordance with their own desires and social practices. *Unless these actions are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint.*" [Emphasis supplied].

The necessity for such a positive provision of law was reiterated by the court in a second suit brought by Williams, *Williams v. Howard Johnson's, Inc.*, 323 F. 2d 102 (4th Cir. 1963), and reaffirmed by that court sitting *en banc* in *Williams v. Lewis*, 342 F. 2d 727 (4th Cir.); *cert. denied*, 382 U. S. 814 (1965). Without a positive provision of law, there can be nothing more than private discrimination; which, of course, is not actionable under Section 1983. *Elders v. Consolidated Freightways Corp.*, *supra*; *cf.*, *Jobson v. Henne*, 355 F. 2d 129 (2d Cir. 1966).

Not only is Section 2046.5 a neutral restatement of common law, but its very existence is in form only. The actions of the Mississippi legislature which gave birth to the statute occurred almost a decade before the incident which is the subject of the present case. Since its enactment the statute has withered into oblivion, never having been enforced by the state. If, as the dissent below urges, the simple existence of this statute can supply the missing state action, then any act by a citizen automatically becomes the act of the state, rendering him liable to Section 1983. Such a result is unconscionable and the Second Circuit properly concluded that "the state must do more than it has done for the required state action to be found" (A. 209).

Petitioner has argued that when the Circuit Court of Appeals decided that Section 2046.5 was insufficient to support state action, it narrowly construed this Court's ruling in *Reitman v. Mulkey*, 387 U. S. 369 (1967) (Petitioner's Brief, p. 26). However, rather than analyze the decision in *Reitman*, petitioner instead attempts to weave in allegations from her conspiracy argument, relating to the incident at the Hattiesburg Library and her arrest on charges of vagrancy (Petitioner's Brief, pp. 44-47), in an unwarranted effort to taint Kress with state action because of the independent and totally unrelated discriminatory acts of the Hattiesburg police.

The present case in no way falls within the ambit of state action set forth in *Reitman*, where this Court, referring extensively to the decision and reasoning of the California Supreme Court, held that Article I, §26 of the California Constitution significantly involved the state in racial discrimination in housing. As the Court of Appeals noted (A. 209), in *Reitman* the State of California, by a widely publicized statewide initiative and referendum, affirmatively acted to repeal its existing anti-discrimina-

tion housing laws, and embodied the right to discriminate in the state's constitution. This Court ruled that the California Supreme Court believed that the "potential impact" and "ultimate effect" of Article I, §26 would be to "significantly encourage and involve the State in private discriminations" 387 U. S. at 373, 380, 381. All this is quite different from the present case, where the only relevant Mississippi statute in question restates the common law, and, though on the books for more than a decade, has never been enforced or invoked. As the Court of Appeals stated, "[a]t least as applied to this case, we think the state must do more than it has done for the required state action to be found" (A. 209).

Both logic and precedent suggest that the mere existence of a statute such as Section 2046.5 cannot clothe private citizens with the authority of the state so as to render private decisions actionable under Section 1983. *Cf., Elders v. Consolidated Freightways Corp.*, 289 F. Supp. 630 (D. Minn. 1968); *Stevens v. Frick*, 372 F. 2d 378 (2d Cir.), *cert. denied*; 387 U. S. 920 (1967).

To allow the existence of Section 2046.5, without more, to be the basis for state action here would be to make state action a nullity. This Court has refused to do such a thing in the past, and, we urge, should refuse to do so now. It is respectfully submitted that if this Court permits petitioner's theory to prevail, it will have positively and effectively removed the state action requirement from the Fourteenth Amendment. Such a result is, we believe, neither necessary nor warranted in this case.

B. Respondent's Refusal of Service Was Not Pursuant to Any "Custom or Usage" of the State

In a further attempt to establish state action, petitioner has contended that there was some custom and usage against the mixing of whites and Negroes in public places in Mississippi in the summer of 1964, and that it was this

custom which prompted respondent to refuse service to petitioner. Petitioner, however, has ignored the clear mandate of the statute that no matter what custom is proven (and none was established here) it must be enforced by the state before it may ground a cause of action.

Section 1983 does not concern itself with non-governmental customs. Just as there must be a significant involvement of the state to prove that a private person acted under color of law, so must the state be equally involved before action pursuant to an alleged private custom becomes state action. Petitioner must show that state power "has in fact been exercised." Cf. *New York Times v. Sullivan*, 376 U. S. 254, 265 (1964.)

Turning to the question of custom, petitioner claims its definition to be:

"a usage or practice of the people which by common adoption and acquiescence, and by long unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject-matter to which it relates." Black's Law Dictionary, 461 (4th ed. 1951).

Contrary to petitioner's assertion, however, this was not the definition of custom which was Congress' intention in Section 1983. In drafting the Civil Rights Act of 1964, Congress originally looked to, and copied verbatim, the language of Section 1983. H. R. 7152, §201(d), 88th Cong. 2d Sess. (1964). However, Congress ultimately legislated that:

"Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter [of the 1964 Act] if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance or regulation; or (2)

is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof. . . ." 42 U. S. C. §2000 a(d).

This language in no way modifies the Section 1983 definition of state action. Rather, it merely clarifies what the word "custom," as used in Section 1983, actually means and has meant since 1866—custom "required or enforced" by the state. This was made clear by Rep. Celler of New York, one of the architects of the 1964 Act, in a statement supporting the amendment to the original bill which embodied the final "custom" language:

"The phrase 'under color of any law, statute, ordinance, regulation, custom or usage' was apparently first used in the Civil Rights Act of 1866 and has appeared in subsequent civil rights legislation. In the civil rights cases the Supreme Court held the word 'custom' in the 1875 Civil Rights Act to mean custom having the force of law—109 U. S. at page 106. This interpretation would seem to be accurate, but since in its original context in the 1866 legislation, custom seems to have referred to official action taken as a matter of accepted practice without formal statutory authority. *Thus, custom or usage is not constituted merely by a practice in a neighborhood or by popular attitude in a particular community. It consists of a practice which, though not embodied in law, receives notice and sanction to the extent that it is enforced by the officialdom of the State or locality.*" 110 Cong. Rec. 1881 (1964). [Emphasis added.]

Representative Meader of Michigan was more succinct when he stated that "it is not some non-State or non-governmental usage or custom being discussed in this passage of the bill." 110 Cong. Rec. 1880 (1964).

The courts have consistently agreed with this interpretation and have stated that

"The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment." *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845, 848 (4th Cir. 1959).

Accord: *Williams v. Hot Shoppes, Inc.*, 293 F. 2d 835 (D. C. Cir. 1961), *cert. denied*, 370 U. S. 925 (1962); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. Md. 1960), *aff'd*, 284 F. 2d 746 (4th Cir. 1960).

In spite of these clear holdings, petitioner has claimed that Section 2046.5 is a sufficient source of state involvement in the relevant custom.* The fact that petitioner offered no other evidence to link the state to the custom explains Judge Bonsal's ruling that for petitioner to prevail, she had to prove that the custom, if one were established, was "enforced by the State of Mississippi pursuant to Section 2046.5" (A. 182).

As discussed at pages 33-38, *supra*, Section 2046.5 has never been enforced or invoked and has thus not involved the state in any way with Kress' action. Since without proof of this necessary element of the case the jury could not have rendered a verdict for petitioner, a directed verdict was appropriate. *Gordon v. Illinois Bell Telephone Co.*, 330 F. 2d 103 (7th Cir.), *cert. denied*, 379 U. S. 909 (1964).

* The following colloquy sets forth petitioner's position:

"The Court: What evidence have you introduced that the state supported it?

"Mrs. Piel: The fact the statute is on the books, that is all" (A. 321).

* * * *

"The Court: So you are relying purely on the statute.

"Mrs. Piel: As to the state action part, yes.

"The Court: Without any evidence whatsoever that that statute has ever been used to enforce this discrimination of which you speak?

"Mrs. Piel: No, that's right" (A. 317).

Petitioner and the dissent below have belabored the question of determining the relevant custom. This is immaterial, however, because the trial court assumed, for purposes of respondent's motion for a directed verdict, that the relevant custom was as urged by petitioner. Irrespective of the relevant custom, whether it be the refusal of service to whites in the company of Negroes or the separation of the races in restaurants or places of public accommodation, the court concluded that petitioner did not proffer sufficient evidence of state involvement. It was, indeed, this absence of proof of the basic Fourteenth Amendment requirement that left Judge Tenney with no choice other than to direct a verdict for respondent (A. 322):

"Even if I were to accept that very broad interpretation of custom and usage to cover any manifestation of the antipathy between the white and black races I just don't see how there would be anything to submit to the jury on the question of whether this was enforced by the state in this particular instance in the record of this case."

"[Y]ou may be right on the broad argument that what you are talking about as custom and usage is the custom and usage vis-a-vis the white and black races in Mississippi. But how are we to infer the defendant knew about it, or how are we to infer that it was enforced on the record before the Court? That is what I must deal with (A. 319)."

"... But strain as I will I can't find state action here.

"... [R]egardless of what the feelings of the people of the community are, if you don't have enforcement by state action, or if it isn't such a

custom and usage in the eyes of the law that it is almost on the same standing as law itself, and recognized by the state, then this is a private action which, rightly or wrongly, has been held not to be covered by the old Civil Rights Act.

"So that is what I am faced with, it seems to me. And on that basis I will direct a verdict for the defendant (A. 322)."

It does not help petitioner to argue that there was a custom in Mississippi among the people generally of fostering the segregation of the races. Even if there were such a custom in the summer of 1964, it would have no bearing on Kress or upon this case, for Kress had only one set of eating facilities in its store, at which it served all customers (A. 282). There is not, and cannot be, any claim that Kress segregated the races in its Hattiesburg store.

Furthermore, the proof in the record establishes that Kress was not aware of and did not act pursuant to Section 2046.5 or any custom or usage, but rather for good cause to avoid serious violence at the moment. Kress served both Negroes and whites, whether they came in together or separately, both before and after August 14th and, indeed, on that very same day (A. 138). Kress had, and still has, a firm written policy prohibiting any discrimination in its stores based upon race, color or creed (A. 106). Because violence was averted on August 14th, the Hattiesburg store has remained open and has continued to serve all people, black and white together, without incident, at its facilities.

This case arose out of the most unusual circumstances, which never occurred before or after the day in question. Thus, it is clear that this case involves only one isolated incident, totally unrelated to any claimed custom, usage or statute of the state.

POINT IV

The District Court correctly excluded two surprise witnesses first designated at trial.

On December 9, 1965, pursuant to Rule 13 of the Calendar Rules of the United States District Court for the Southern District of New York, that court ordered the parties to exchange lists of witnesses and to file pre-trial memoranda setting forth a list of witnesses which each party intended to call along with the specialties of experts to be called (A. 119). Petitioner listed, in addition to herself, only the six students (A. 199).

The parties thereafter agreed to a pre-trial order which provided that the only witnesses at the trial would be those previously designated, and

“[s]hould any party hereafter decide to call any additional witnesses, *prompt* notice . . . shall be given. . . . It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum.” [Emphasis the court’s] (A. 195)

A similar requirement was set forth in the pre-trial order with respect to any expert witnesses (A. 195).

Despite the fact that a pre-trial conference was held before the trial judge two weeks prior to trial, at which time petitioner’s counsel made no mention of new witnesses, on the day before trial, petitioner served a paper entitled “Amendment to Trial Memorandum” advising respondent, for the first time, of her intention to call an expert witness. In her trial memorandum, served the same day, petitioner mentioned, in passing, proposed testimony of a second witness whose name had never before appeared in the case. In neither instance did petitioner

"set forth the reason why the witness was not theretofore identified" as required by the District Court's order.

When respondent's counsel objected to the surprise calling of these witnesses, it became clear that despite the fact that the issues to be tried had been agreed to almost a year earlier, petitioner's counsel had made no effort to secure these witnesses until the week before the trial (A. 229-30). Even at that late date, counsel did not inform respondent of the fact of the additional witnesses, much less their names. The problem was further complicated by the fact that petitioner's counsel confessed that she had not met the proposed witnesses and did not really know what their testimony would be (A. 231, 233).

Petitioner's excuse here is identical with that offered in *Thompson v. Calmar S. S. Corp.*, 331 F. 2d 657, 662 (3d Cir.), *cert. denied*, 379 U. S. 913 (1964), where the court ruled that

"the only excuse offered by the defendant is that it was uncertain that the witness would be available at the time of trial. In these circumstances it would be wholly contrary to the spirit of our Rules and destructive to orderly procedure to have permitted him to testify."

The effect of such a tactic in this case would have been to strip Kress' counsel of an opportunity to prepare for cross-examination of these witnesses, whom Kress' counsel had never even heard of before. Such a sporting theory of justice has been condemned as repugnant to our judicial system. *Clark v. Pennsylvania R. R. Co.*, 328 F. 2d 591, 594-595 (2d Cir.), *cert denied*, 377 U. S. 1006 (1964); *Hoeppner Construction Co. v. United States*, 287 F. 2d 108 (10th Cir. 1960); *Globe Cereal Mills v. Scrivener*, 240 F. 2d 330 (10th Cir. 1956).

The vacuity of petitioner's argument is demonstrated by the fact that her counsel advised the court that a postponement of the case would not help because "on the date the case could be put over I could well not have had" the witness (A. 233).

Further, petitioner admitted in her brief below that while the two excluded witnesses would have testified with respect to custom and usage in Mississippi in 1964, the exclusion of these witnesses was not "pivotal since evidence was adduced through plaintiff as to the custom and usage" in Hattiesburg. Obviously where, as here, the testimony of the witnesses would have been cumulative and of no probative value, it is within the sound discretion of the trial court as to whether it should be admitted. *Mahoney v. N. Y. Cent. R. R.*, 234 F. 2d 923 (2d Cir. 1956); *Jahn v. Pedrick*, 229 F. 2d 71 (2d Cir. 1956).

The facts here demonstrate, as the Circuit Court unanimously agreed, that not only was it a proper exercise of discretion to exclude the witnesses pursuant to Rule 16 of the Calendar Rules of the District Court, but, indeed, it would have been an abuse of discretion and prejudicial to respondent to do otherwise. *Cf., Thompson v. Calmar S. S. Corp., supra; Taggart v. Vermont Transportation Co.*, 32 F. R. D. 587 (E. D. Pa. 1963), *aff'd per curiam*, 325 F. 2d 1022 (3d Cir. 1964). Such a ruling will be set aside only where it is "manifestly erroneous." *Salem v. United States Lines Co.*, 370 U. S. 31 (1962).

CONCLUSION

For all of the foregoing reasons, the judgments and orders of the Courts below should be, in all respects, affirmed.

October 3, 1969

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—against—

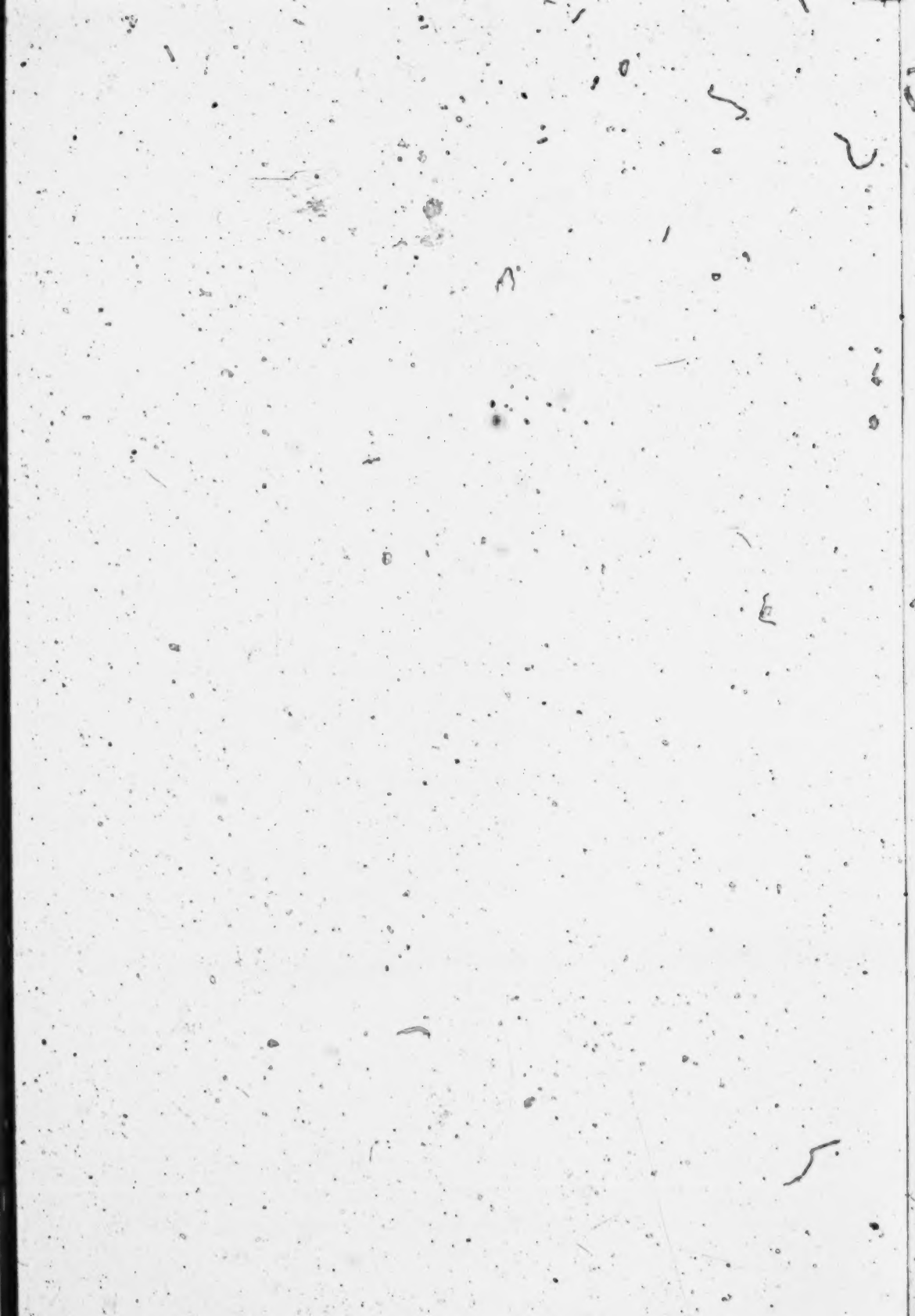
S. H. KRESS AND COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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Summary of the Argument

1. The District Court should not have granted summary judgment on the conspiracy charge Miss Adickes brought against Kress and the Hattiesburg police. For the combined illegal actions in refusing service to Petitioner Adickes because she, a white, was in the company of Negroes (by Kress), for denying library service to Negro children accompanying Petitioner and arresting Petitioner for vagrancy (by the Police) were intimately related in time and effect. The affidavit denials produced by Kress were insufficient to sustain the moving party's burden of proof *First National Bank v. Cities Service*, 391 U.S. 253 (1968). In addition, the moving party resisted and suppressed discovery proceedings which would have shown the long-standing policy of segregation at Kress as to physical facilities.

2. The requirements of 42 U.S.C. §1983 were met as to both color of state action and color of custom and usage in the refusal of Kress to serve Miss Adickes as demonstrated by a series of Mississippi legislative acts disapproving of this Court's opinion in *Brown v. Board of Education*, 347 U.S. 483 and by the admitted interpretation of the Kress waitress of the custom against integration of the races in public places in Mississippi in 1964 when she said in effect to petitioner at the time she refused service we have to serve the colored but not the whites who accompany them.

3. Recent action by this Court consistent with the Congressional intent at the time of the Reconstruction Con-

gress has revised the constitutionality of the Civil Rights Act of 1875 which is applicable to the case at bar. See *Bell v. Maryland*, 378 U.S. 226, 297, 298 n. (1964). *Jones v. Mayer*, 392 U.S. 409 (1968) applied similar reasoning to little-invoked 42 U.S.C. §1982. Also see *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

The issue is squarely before this Court because it was raised in the questions posed in the petition for certiorari. Rule 23 (1) (c) of this Court.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—against—

S. H. KRESS AND COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

POINT I

The motion for summary judgment on the conspiracy count was erroneously granted on inadequate affidavit evidence in the face of contrary evidence and evidentiary inferences in the record.¹

Respondent failed to show by affidavit or otherwise, on motion for summary judgment, that the facts surrounding the charge of conspiracy between respondent Kress and the Police in arresting petitioner for vagrancy were not susceptible of the interpretation petitioner asserted.

Scolnick v. Lefkowitz, 329 S.2d 716 (2 Cir. 1964), cert. den. 379 U.S. 825 is inapposite to the facts in the case at bar—the Court of Appeals there stated that: “The plain-

¹ Answering Point I of Respondent's brief (RB 13 et seq.).

tiffs vaguely assert that the defendants departed from the scope of their official duties in a conspiracy to incarcerate them illegally in a mental institution." As against a vague assertion, defendant there offered "detailed affidavits categorically denying the existence of such a conspiracy"—but even more important the record showed that as against plaintiffs' charge of wrongdoing, "The defendants' conduct is clearly privileged as in the exercise of their official, quasi-judicial functions."

Respondent Kress cannot plead any such "privilege". Nor did it offer a detailed or competent denial of the conspiracy charges as will appear *infra*.

Respondent breaks down petitioner's conspiracy allegations into three categories and deals with each of these categories independently—(1) the library incident, (2) the refusal to serve petitioner and (3) the arrest of petitioner for vagrancy.

Respondent terms "preposterous" the connection of the incident at the library with any conspiracy [RB 44]. Concededly, at the time the court ruled on the summary judgment there was no direct evidence that respondent played any role in having petitioner and the six Negro children who accompanied her, evicted from the Hattiesburg Public Library. There was a definite connection established, however, between the librarian and the Chief of Police and the record is clear that the librarian made a number of telephone calls.²

² Q. Then what did they (Miss Adickes and the six Negro children) do? A. They decided to stay, and we sat down and the librarian made a number of phone calls and we were there for about—between twenty minutes and a half hour before the police chief came [A 70].

The next incident chronologically was the refusal to serve petitioner by Kress—a conceded refusal to serve [RB 21]. In its brief, this concession is made by respondent, but the brief argues that the denial of service was neither “conspiratorial” or “based upon race, color or creed.” On this issue, respondent failed to offer by way of affidavit, deposition or otherwise convincing proof that the refusal to serve petitioner was not based on her association with Negroes or that there was no connection with the police at the time of the refusal to serve her. There is no denial by affidavit or otherwise as to reason given petitioner for the refusal to serve. The waitress said to petitioner:

“I am not serving you.” In answer to “Why not?” She said: “We have to serve Negroes, but we are not serving whites who come in with them.” When asked if she realized that it was a violation of the Civil Rights Bill she said: “Yes, we know. But my manager told me not to serve you” [A 76].

Respondent produced a statement of Miss Freeman, the waitress which, although not using exactly the same words, was confirmatory of petitioner’s conversation with the waitress as she reported it at the deposition and at the trial [A 177].³

Although a notice of motion was served on respondent to produce Miss Jo Ann Baggett, the Kress food counter supervisor on the day of the incident, Kress refused to produce her for deposition, nor did Kress offer any affi-

³ Respondent denies that this unsworn statement was “offered”—the statement, however, was produced by respondent as petitioner had no access to Miss Freeman in the pre-trial discovery proceedings. The statement was marked Exhibit 9 in the deposition of Gordon Powell [A 177].

davit on her part to deny that she took part in any conspiracy, although she was described by the store manager, Gordon Powell, as the one person in the store with whom he discussed policy concerning "mixed groups" [A 131, 132]. She was also the person who, according to the unsworn statement of the waitress, Dolores Freeman, issued the instruction not to serve petitioner [A 177].

In further support of the apparent hypocrisy of the respondent as to its policy of non-discrimination in service on racial grounds, is the self-serving affidavit of Louis P. Johnson, the President of Kress, offered in support of the motion for summary judgment [A 104, 105]. Mr. Johnson stated categorically in his affidavit: "It is and has been the policy of Kress not to discriminate against any person because of race, color or creed." In support of this statement, Mr. Johnson attaches a notice to all store managers, dated July 15, 1964—13 days after the Civil Rights Bill (42 U.S.C. 2000 et seq.) became the law of the land. That statement says *inter alia*: "We may no longer segregate facilities such as Food Departments, rest rooms, cloak rooms, toilets, lounges and drinking fountains . . . you are to immediately check to be sure that Food Departments, drinking fountains, lunchrooms, cloak rooms, toilets, lounges, etc. are not designated either for Colored or White. Any signs which are still on the doors or walls are to be removed."

The clear implication of this is that as of July 15th and perhaps August 14, 1964, there were still segregated facilities in Respondent's stores—it certainly does not support, and is at variance with the sweeping affidavit declaration that it "has been [indicating long-time custom] the policy of Kress not to discriminate against any person because

of race, color or creed." Moreover, when, by interrogatory, petitioner initially sought to ascertain whether or not on August 14, 1964, the toilet and drinking fountain facilities at the Kress Hattiesburg store were in fact segregated by race, respondent refused to answer and that refusal to answer was upheld by the District Court below as irrelevant [See this brief *infra* p. 21].⁴ Then, with this ruling the law of the case, respondent continued to bar petitioner from ascertainment of the facts in the deposition of Mr. Powell who was again asked concerning separation of the races and the facilities in the Hattiesburg store, and was instructed not to answer [A 128].

Respondent has crossed the credibility line when it asserts in its brief, page 44: "There is not, and cannot be, any claim that Kress segregated the races in its Hattiesburg store."

At the time the District Court ruled on respondent's motion for summary judgment, in addition to the clear evidence before the court of refusal to serve petitioner because, she, a white, was in the company of Negroes, there was evidence that a member of the police department who later was to arrest petitioner on a charge of vagrancy, came into the Kress store during the time that the petitioner sought food service. Accordingly, at this juncture the refusal to serve petitioner and her subsequent arrest on the charge of vagrancy become associated chronologically and factually. There were no facts offered by respondent, by affidavit or deposition which conclusively

⁴ Petitioner prints at the conclusion of this brief copies of the order of the District Court of April 30, 1965 and the pretrial examiner's report of April 27, 1965 on which it was based as an addendum to the joint appendix, heretofore filed (*infra* pp. 21-24).

disassociated the two events joined so closely in time. The various statements and depositions offered support petitioner's inferences of a conspiracy despite respondent's attempt to deny categorically such conspiracy between respondent and the Hattiesburg police.

By another unsworn statement of an employee of respondent, Miss Irene Sullivan, employed as a cashier in its Hattiesburg store on August 14, 1964, it appears that a policeman, Patrolman Hillman—one of the officers who arrested petitioner on a charge of vagrancy within minutes after she left respondent's store—entered the store and exchanged greetings with Miss Sullivan [A 178]. Miss Sullivan denied making contact with Patrolman Hillman in a way which might have caused Miss Adickes' arrest [A 178]. Yet we learn from the deposition of Mr. Powell, the store manager, that the coming in of a "mixed" group to the lunch booth area was anticipated days or weeks earlier, and that in anticipation of the arrival of such a group, and the store taking action against it, certain signs were worked out so as to coordinate the conduct of the store employees toward the service of such a group [A 135]. A reasonable inference, among others, that could be drawn from the statement, affidavit and deposition evidence, is that a "sign" was given by Miss Baggett to Patrolman Hillman directing him to make the arrest of petitioner. There is no denial or testimony by affidavit or otherwise, from Miss Baggett on this subject and petitioner sought in vain to take her deposition [A 121].

Consistent with this position is the affidavit of Hugh Herring, the Chief of Police, offered in support of the motion for summary judgment by respondent, which controverted the conspiracy charge only by denying that he

had any discussion with Mr. Powell, the store manager, concerning Miss Adickes' arrest. This specific and narrow denial was in the nature of a "negative pregnant". The clear inference from such a denial is that discussions between Chief Herring and other employees of Kress could have taken place and either did or could have sparked or cooperated in inducing the arrest.

There are affidavit denials, it is true, by both the arresting patrolmen Emmett Boone and Ralph A. Hillman that they consulted with anyone at all prior to the arrest [A 110, 117]. These denials are controverted by the events and by the testimony of the petitioner.

Miss Adickes testified by way of deposition that she was told by the police at the time of her arrest, immediately upon her leaving the Kress premises where she had been refused service because she was in the company of Negroes, that "We have orders to pick you up" [A 77]. This same statement was repeated to her later at the police station [A 79]. It is here submitted that the affidavit denials of the two police officers are inherently unbelievable. Accordingly, the two patrolmen must have been telling untruths when they said in their affidavits that they made an "Officer's discretion arrest" of Miss Adickes without consultation with anyone, including their Police Chief—particularly where they offered no affirmative explanation for making the arrest, nor is there any other believable reason in the record.⁵

⁵ The Fifth Circuit found that the "conduct which caused the arrest was clearly protected under the provisions of Sec. 201 of the Civil Rights Act of 1964, attempts to enjoy equal public accommodation in a Hattiesburg City Library, and a restaurant in the nationally known Kress store." *Achtenberg, Adickes v. Mississippi*, 393 S. 2nd 468, 474 (1968).

The bare record at the time respondent sought summary judgment under Federal Rule 56 did not contain "affidavits or other evidentiary matter sufficient to show that there [was] no genuine issue as to material fact" on the conspiracy issue. *Robin Construction Company v. U. S.*, 345 F.2d 610, 614 (3 Cir. 1965). A review of the law concerning the appropriateness of summary judgment appears in *Subin v. Goldsmith*, 224 F.2d 753, 758 (2 Cir. 1955) where the Court of Appeals for the Second Circuit in quoting *Colby v. Klune*, 178 F.2d 872, 873-875 (2 Cir. 1949) said: "The statements in defendants' affidavits certainly do not suffice [for the granting of summary judgment] because their acceptance as proof depends on credibility."; in the case at bar, the so-called facts asserted by way of affidavit show within the four corners of the statements themselves inconsistencies which would compel a court to question their credibility.

In a long and reasoned opinion by Mr. Justice Marshall, discussing the facts of the case at length, this Court recently upheld a summary judgment in *First National Bank v. Cities Service*, 391 U.S. 253, 289 [1968]. This Court held that Rule 56(e) of the Rules of Federal Procedure places upon the party opposing summary judgment "the burden of producing evidence" only after the moving party "conclusively showed that the facts upon which [the moving party] relied to support his allegations were not susceptible of the interpretation which he sought to give them."

The respondent made no "conclusive" or even satisfactory showing of the existence of facts which would justify a summary judgment in the case at bar. Respondent opposed discovery which would have revealed the de facto segregation of facilities in the Kress store at the time of

the incident. Although respondent produced the manager of the store for a deposition, it refused to produce the sub-manager, who, according to Dolores Freeman, the waitress, had given the order to her to refuse service to petitioner. Nor did respondent offer any deposition from such sub-manager to deny petitioner's allegations. The affidavits of the arresting officers were inherently unbelievable—and contrary to the law of the case found by another federal court. See *Achtenberg, Adickes v. Mississippi, supra*. The affidavit of the Chief of Police was a negative pregnant which specifically left undenied all other reasonable inferences connecting respondent's conduct with the Police. Finally, testimony of the petitioner by deposition also put in issue the truth and credibility of the assertions of the moving party to this summary judgment. Under these facts it was error for the District Court to grant summary judgment.

POINT II

Petitioner met any "state action" requirement necessary in her allegations and proof of discrimination against her in a public eating establishment on account of race—which discrimination was supported by express Mississippi legislation and by custom and usage in the state.⁶

In attempting to challenge the clear state of the record which shows that petitioner was denied service at Kress because she, a white, was in the company of Negroes, respondent picks and chooses supportive language from cases and doctrines which this Court has repudiated.

⁶ Answering Point III of Respondent's brief (RB 30 et seq.).

Petitioner does not concede that the case at bar involves a "mere private action"; for, as set forth in her brief, pages 23-36, she presents the specific Mississippi statutory authority and discusses the custom and usage which supported respondent's waitress in her propounding of a novel statement of the prevailing discriminatory rule in Mississippi:

"We have to serve colored but . . . not . . . the whites that come in with them" [A 253].

Two cases recently decided by this Court, however, further raise the question as to whether or not private discrimination alone under the circumstances would not be sufficient to state a cause of action under 42 U.S.C. §1983. In *Jones v. Mayer Co.*, 392 U.S. 409, 423 (1968) this Court said of §1982, which preceded §1983 by five years:

"To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by 'state or local law' but also by 'custom or prejudice.'"

Section 1983 clearly speaks in parallel language to §1982 of "color of any statute, ordinance, regulation, custom or usage," of any state.

Respondent refers to petitioner's reliance on the three Mississippi Code Sections and a Senate Joint Resolution, as a "fabricated" "argument." The court below also found it possible to ignore the relevance of these actions by the Mississippi State Legislature to the petitioner's case, and

* Mississippi Code §§2046.5 (1956), 2056 (7) (1954), 4065.3 (1956), Ch. 466 Senate Concurrent Resolution No. 125 (1956).

the plainly contumacious attitude these actions express toward the law of the land. The Mississippi State Legislature adopted these sections and the resolution after this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954); they specifically noted "the segregation laws of this state" and reaffirmed the prohibition of the "mixing or integration of the white and Negro races in public places of amusement, recreation or assembly in the state" [See petitioner's brief p. 24]. This Court will surely share petitioner's bewilderment that the court below could have ignored this clear language as supporting a state policy of the segregation of the races in these sections; and could have stated that, except for the trespass section, §2046.5, the other sections dealt only with school integration and could accordingly have concluded that this language shed "no light on Mississippi customs and usages."

Since these laws were on the statute books of the state at the time of the August 14th incident, it is difficult to understand respondent's reference to their "obvious inapplicability" [RB 33]. So also is it difficult to understand respondent's reference to *Achtenberg, Adickes v. Mississippi*, 393 F.2d 468 (5 Cir. 1958) as "irrelevant." Said respondent [RB 34 footnote]: "That opinion reveals arrests for vagrancy not trespass which were totally unrelated to Kress. There was no proof and no finding that those arrests were related to Kress." A charitable reading of this passage in respondent's brief suggests that respondent simply did not read the plain language of the opinion of the Fifth Circuit Court of Appeals. For that court said in *Achtenberg* of the conduct of Miss Adickes and four other petitioners, as to the facts on that very August 14, 1964 in Hattiesburg, Mississippi: "These petitions for removal to-

gether with the affidavits, clearly support the allegations in the petition that the conduct which caused the arrest of these five persons under the vagrancy statutes or ordinances of the state of Mississippi or the city of Hattiesburg, was conduct clearly protected under the provisions of Section 201 of the Civil Rights Act of 1964; attempts to enjoy equal public accommodations in the Hattiesburg City Library [footnote omitted] and a restaurant in the nationally known Kress store. . . . They alleged that this was the fact. *They proved it at a hearing* which brought no counter proof." [393 F.2d at 474, 475] (emphasis supplied)

Petitioner finds it equally difficult to follow the reasoning of respondent which refers to Mississippi Code §2046.5 as "merely a neutral, colorless statute which provides that a restaurant owner may choose such customers as he pleases" [RB 34]. Respondent then goes on to assert: "In fact this [§2046.5] amounts to no more than a restatement of the ancient common law principle that a restaurant owner who does not offer lodgings to travelers may accept some customers and reject others, on personal or indeed, any grounds, there being no duty to serve all customers" [RB 34].

The scholarship respondent then relies upon to support this proposition is *R. v. Rymer* [1877] 2 Q.B. 136, where the court distinguished a hotel from "a mere shop in which spirits are retailed across the counter." Certainly that "mere shop" is not the same as the Kress lunch counter where people presumably were served victuals.

In contrast to the strained distinctions between an inn and a restaurant urged by respondent, supposedly derived from common law, is a passage from Justice Goldberg's

concurring opinion in *Bell v. Maryland*, 378 U.S. 226, 297 n., 298 (1964):

The treatise [Judge Story on Bailments] defined an innkeeper as "the keeper of a common inn for the lodging and entertainment of travellers and passengers" Story, *Commentaries on the Law of Bailments* (Schouler, 9th ed., 1878), §475. 3 Blackstone, *op. cit.*, *supra*, note 10, at 166, stated a more general rule:

"[I]f an innkeeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages if he, without good reason, refused to admit a traveler." (Emphasis added.) In Tidswell, *The Innkeeper's Legal Guide* (1864), p. 22, a "victualling house" is defined as a place "where people are provided with food and liquors, but not with lodgings," and in 3 Stroud, *Judicial Dictionary* (1903), as "a house where persons are provided with victuals, but without lodging."

Regardless, however, of the precise content of state common-law rules and the legal status of restaurants at the time of the adoption of the Fourteenth Amendment, the spirit of the common law was both familiar and apparent. In 1701 in *Lane v. Cotton*, 12 Mod. 472, 484-485, Holt, C.J., had declared:

"[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such

an office, under pain of any action against him. . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier. . . . If the inn be full, or the carrier's horses laden, the action would not lie for such refusal; but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public." See *Munn v. Illinois*, 94 U.S. 113, 126-130 (referring to the duties traditionally imposed on one who pursues a public employment and exercises "a sort of public office").

Furthermore, it should be pointed out that the Framers of the Fourteenth Amendment, and the men who debated the Civil Rights Acts of 1866 and 1875, were not thinking only in terms of existing common-law duties but were thinking more generally of the customary expectations of white citizens with respect to places which were considered public and which were in various ways regulated by laws. See *infra*, at 298-305. Finally, as the Court acknowledged in *Strauder v. West Virginia*, 100 U.S. 303, 310, the "Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect," for those who adopted it were

conscious that a constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373."

Since *Bell v. Maryland*, moreover, this Court has on two occasions spoken out to condemn as unconstitutional under the Fourteenth Amendment specific state constitutional or legislative enactments which would authorize or permit discrimination between white persons and Negroes. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969). Nor can Mississippi Code Section 2046.5 be read alone or as a "neutral statement of the law" where it is clear from other Mississippi legislative enactment following the *Brown* decision that it was the precise intention of the state legislature to promote and sanction the continuation of racial discrimination and segregation in Mississippi. That legislature—in the same year, 1956, in which it passed §2046.5—condemned the *Brown* decision as "in violation of the Constitution of the United States and the State of Mississippi, and [said] all similar decisions are in violation of the Constitution of the United States and the State of Mississippi and are therefore unconstitutional and of no lawful effect within the territorial limits of the State of Mississippi" [see Petitioner's brief, p. 56].

With this background it is hard to understand respondent's statement:

"Not only is §2046.5 a neutral restatement of common law, but its very existence is in form only. The actions of the Mississippi legislature which gave birth to the statute occurred almost a decade before the incident

which is the subject of the present case. Since its enactment the statute has withered into oblivion never having been enforced by the State" [RB 38].*

Respondent cites a number of cases from the Fourth Circuit involving a redoubtable Negro attorney named Williams who sought to establish his right to be served at restaurants of the Howard Johnson chain. See *Williams v. Howard Johnson Restaurant*, 268 F.2d 845 (1959), *Williams v. Howard Johnson's Inc.*, 323 F.2d 102, reaff'd *Williams v. Lewis*, 342 F.2d 727 (1965), cert. den. 382 U.S. 814 (1965). Whether or not this Court would, in 1969, affirm those rulings, it is significant that the Fourth Circuit sitting en banc must have considered that the passage of the 1964 Civil Rights Act affirmatively changed the legal status of persons suing to establish a right not to be discriminated against in a restaurant after passage of the Civil Rights Act.*

Petitioner finds equal difficulty in understanding respondent's assertions that there is a clear mandate in §1983 that a custom of segregation, if alleged "must be enforced

* In this connection compare *United States v. Guest*, 383 U.S. 745 (1966) and *United States v. Price*, 383 U.S. 787 (1966) concerning the "oblivion" to which the spirit behind §2046.5 was relegated by some law enforcement officers and white citizens of the State of Mississippi in the summer of 1964.

* "Under Virginia law, a restaurant owner is not an innkeeper charged with a *common law* duty to serve everyone who applies. He may accept some customers and reject others on purely personal grounds. *Alpaugh v. Wolverton*, 184 Va. 934, 36 S.E.2d 906, cited and discussed by this court in *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4 Cir. 1962), and *Williams v. Howard Johnson's Inc. of Washington*, 323 F.2d 102 (4 Cir. 1963). Plaintiff's asserted cause of action arose years before the 1964 enactment by Congress of laws materially affecting civil rights." *Williams v. Lewis*, *supra* p. 730 n.

by the state before it may ground a cause on action" [RB 40]. This Court noted in *Jones v. Mayer*, 392 U.S. 409, 423 (1968), that the language of §1982 refers to law and to custom as alternative and equally illegal auspices under which a citizen may be deprived of his constitutional rights;¹⁰ these alternatives are similarly spelled out in §1983.

Respondent asserts, without any recitation of authority that Congressional action in defining discrimination or segregation under 201(d) of the Civil Rights Act of 1964 [42 U.S.C. §2000(a)(d)], "clarifies" the word "custom" as used in §1983 passed by a Reconstruction Congress nearly 100 years before [RB 41]. Whether or not this statement of respondent concerning "state action" is true, this Court need not meet that issue since, as petitioner has repeatedly pointed out above the State of Mississippi by statutory

¹⁰ Several weeks before the House began its debate on the Civil Rights Act of 1866, Congress had passed a bill (S. 60) to enlarge the powers of the Freedmen's Bureau (created by Act of March 3, 1865, c. 90, 13 Stat. 507) by extending military jurisdiction over certain areas in the South where, "in consequence of any State or local law, . . . custom, or prejudice, any of the civil rights . . . belonging to white persons (including the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . .) are refused or denied to Negroes . . . on account of race, color, or any previous condition of slavery or involuntary servitude. . . ." See Cong. Globe, 39th Cong., 1st Sess. 129,209 (emphasis added). Both Houses had passed S. 60 (see *id.*, at 421, 688, 748, 775), and although the Senate had failed to override the President's veto (see *id.*, at 915-916, 943) the bill was nonetheless significant for its recognition that the "right to purchase" was a right that could be "refused or denied" by "custom or prejudice" as well as by "State or local law." See also the text accompanying nn. 49 and 59, *infra*. Of course, an "abrogation of civil rights made 'in consequence of . . . custom, or prejudice' might as easily be perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance." J. tenBroek, *Equal Under Law* 179 (1965 ed.). (*Jones, supra*, p. 423.)

enactment has given its state sanction to the long established custom of segregation of the races in public places in Mississippi and indeed, respondent's employee was merely asserting that custom when she told petitioner: "We have to serve the colored, but we are not going to serve the whites who come in with them" [A 253].

Respondent uses a further bootstrap argument when it states: "Furthermore, the proof in the record establishes that Kress was not aware of and did not act pursuant to §2046.5 or any custom or usage, but rather for good cause to avoid serious violence at the moment" [RB 44]. The record on trial is bare of any such evidence. Respondent sought, by producing its store manager Powell at a deposition prior to trial, to introduce this defense to the accusation. Powell did not—in fact could not—deny what petitioner said the waitress said to her. Nor could what was said at the deposition be considered by this Court as relevant to whether or not petitioner presented a prima facie case at trial.

The conduct of which petitioner complained when she filed her complaint against respondent was precisely the kind of discrimination which the Reconstruction Congress in 1871 sought to reach when it passed §1983. The facts in the case at bar squarely present a case of deprivation of rights, privileges and immunities secured by the Constitution and laws effected by respondent acting both under color of statute and under color of custom and usage prevailing in the State of Mississippi on August 14, 1964. Accordingly, it was error for the District Court to direct a judgment against the plaintiff.

POINT III

Recent Supreme Court rulings have revived the constitutionality of the Civil Rights Act of 1875.¹¹

When this Court granted certiorari one of the questions certified for review was Number 3 (see Petitioner's brief p. 2):

"Whether Petitioner, deprived of her constitutional rights as described in questions 1 and 2 above, is entitled to statutory damages against Respondent pursuant to the Civil Rights Act of 1875, for being denied the right to the use of a public accommodation."

All of the questions presented are squarely before this Court as there was no limitation in its granting review of the issues.¹²

Nor is the claim of Petitioner that she could invoke the provisions of the Civil Rights Act of 1875 as totally without merit as respondent seeks to impress this Court.

In *Jones v. Mayer Co.*, 392 U.S. 409 (1967) this Court reviewed the Civil Rights Act of 1866, 42 U.S.C. §1982 in permitting a Negro, discriminated against by private persons in the purchase of property, to sue because his

¹¹ Answering Point II of Respondent's brief (RB 26 et seq.).

¹² Respondent cited three criminal cases purportedly holding that an issue not argued in the Court of Appeals may not be raised by this Court (RB 26). *Lawn v. United States*, 355 U.S. 339, 363 cited by respondent, based its holding on the fact that the issue challenged "was not mentioned in the petition for certiorari filed in this Court and cited Rule 23(1)(c) of this Court which provides that only questions set forth in the petition or fairly comprised therein will be considered by this Court.

right to purchase real property was impinged by "custom or prejudice," unassisted by "State or local law." The quotation from Mr. Justice Goldberg cited *supra* pp. 13-15, is in contradiction to the authority invoked by respondent from the Fourth Circuit based on the series of *Williams* cases *supra* p. 16.

Respondent's reliance on the 1964 Civil Rights Act is misplaced for although its passage may have enlarged the rights for and on behalf of our minority citizens, it has not narrowed them. This Court has found that intention to be the elimination of race segregation in public places — "to obliterate the effect of a distressing chapter of our history." *Hammy v. Rock Hill*, 379 U.S. 306, 316 (1964).

CONCLUSION

The judgment of the Court below should be reversed and the case remanded to the District Court under appropriate instructions permitting Petitioner to sue for damages under 42 U.S.C. §1983 and the Civil Rights Act of 1875.

Respectfully submitted,

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Of Counsel

November, 1969

ADDENDUM TO JOINT APPENDIX

Order of the District Court of April 30, 1965

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Civ. 3426

SANDRA ADICKES,

Plaintiff,

~~—against—~~

S. H. KRESS & COMPANY,

Defendant.

Defendant's motion pursuant to Rule 33 of the Federal Rules of Civil Practice seeking an order striking out certain interrogatories propounded by plaintiff having come on to be heard before the undersigned in the Motion Part on April 22, 1965, and said motion having been referred to Pre-Trial Examiner, Gregory J. Potter, for hearing and report, and the Pre-Trial Examiner having reported on April 27, 1965, and the court being fully advised, and plaintiff having withdrawn interrogatory #4, it is

ORDERED that defendant's motion with respect to interrogatory 15 is granted, and, in all other respects, defendant's motion is denied, and it is further

ORDERED that answers to interrogatories as to which objections were overruled shall be served within 30 days from the date of this order.

JOHN M. CASHIN
U.S.D.J.

Dated, New York, N. Y.
April 30, 1965

Pre-Trial Examiner's Report of April 27, 1965**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

SANDRA ADICKES,*Plaintiff,***—against—****S. H. KRESS & COMPANY,***Defendant.*

Defendant's motion pursuant to Rule 33 of the Federal Rules of Civil Procedure seeking an order striking out certain interrogatories propounded by plaintiff came on to be heard before Judge Cashin in the Motion Part on April 22, 1965 and was referred to the undersigned for hearing and report.

At the hearing conducted in accordance with said instruction, plaintiff withdrew interrogatory #4 and the attorney representing defendant stated that the objections to the remaining interrogatories could be placed into two categories, namely:

1. All of the interrogatories objected to with the exception of interrogatory #15 inquire with respect to a period of time that cannot be material to the instant law suit, and
2. Interrogatory #15 is clearly irrelevant.

To properly view the objections raised, a brief review of the issues raised by the pleadings is in order.

Plaintiff brings this action to recover damages allegedly sustained as a result of a conspiracy to which defendant was a party which deprived her of her civil rights. Plaintiff, a female Caucasian school teacher, residing in New York, claims that while she was in Hattiesburg, Mississippi, as a volunteer teacher at a Freedom School sponsored by the Council of Federated Organizations, she, together with six negro students, attempted to use the facilities of Hattiesburg Public Library. They were refused the use of said facilities and were requested to leave. Thereafter plaintiff together with the six negro students went to the store owned and operated by defendant for the purpose of having lunch. It is claimed that while having lunch a waitress in the employ of defendant, while accepting the orders of the negro students, refused to serve plaintiff because she was accompanied by negroes. As a result of this wilful and malicious conduct, plaintiff claims damages in the amount of \$50,000.

As a second cause of action plaintiff claims that while she was sitting at the booth of defendant's store, an officer of the law entered the store and observed plaintiff. When plaintiff and the negro students left the store, she was arrested and taken into custody. Plaintiff claims this arrest, upon information and belief, was due to a conspiracy between defendant and the Chief of Police, and that as a result thereof plaintiff was damaged in the amount of \$500,000.

Defendant's principal ground with respect to the objections to interrogatories (other than interrogatory #15) is that said interrogatories inquire with respect to matters during a period from January 1, 1964 until August 14, 1964.

Defendant contends that since plaintiff's claim involves an incident at the store which took place on August 14, 1964, plaintiff should not be allowed to inquire with respect to events in January of 1964. Defendant contends that at best plaintiff's inquiry should be limited from July 4, 1964, the date she arrived in the State of Mississippi.

Plaintiff wishes to prove that the policy of the store with respect to the service of negroes and whites changed on or after July 2, 1964, the date of the passage of the Civil Rights Act of 1964. Plaintiff wishes to prove that the policy of the store was to discriminate prior to the passage of the Civil Rights Act, and that, in fact, the discrimination alleged by plaintiff was merely a continuance of the prior policy.

Predicated upon the liberal discovery rules of the Federal Court, I would recommend that defendant's objections to these interrogatories be overruled. Answers to said interrogatories may very well lead to admissible evidence.

Interrogatory #15 inquires whether on August 14, 1964, the use of toilet facilities at the Hattiesburg store were segregated by race and, thereafter, in three subdivisions seeks the number of toilets on the premises, whether any water fountains were on the premises and, if so, the exact location of each and whether said water fountains were segregated by race.

I believe that this area of inquiry is so far removed from any relationship to the issues in this case that defendant's objections should be sustained.

Respectfully submitted,

GREGORY J. POTTER

Dated, New York, N. Y.

April 27, 1965

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 79

SANDRA ADICKES,

Petitioner,

against

S. H. KRESS AND COMPANY,

Respondent.

**RESPONDENT'S STATEMENT TO PETITIONER'S
REPLY BRIEF**

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Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 79^a

SANDRA ADICKES,

Petitioner,

against

S. H. KRESS AND COMPANY,

Respondent.

**RESPONDENT'S STATEMENT TO PETITIONER'S
REPLY BRIEF**

Petitioner's reply brief raises, for the first time and at the eleventh hour, a point concerning the alleged conspiracy which is simply untrue. Respondent submits this brief statement to correct that error. This statement does not consider the other portions of the reply brief, as they contain no new material.

Petitioner, in a last frantic effort to create a factual issue concerning the alleged conspiracy, attempts to tie Kress to the police by weaving some theory that

“A reasonable inference, among others, that could be drawn from the statement, affidavit and deposition evidence, is that, a ‘sign’ was given by Miss Baggett to Patrolman Hillman directing him to make the arrest of petitioner” (Reply Br. p. 6).

Petitioner then goes on to boldly state to this Court:

“There is no denial or testimony by affidavit or otherwise, from Miss Baggett on this subject and petitioner sought in vain to take her deposition.” *
• (Ibid.)

* While petitioner states that Kress “refused” to produce Miss Baggett for deposition (Reply brief, pp. 3, 9), the fact is that the District Court held that Miss Baggett was not a managing agent and therefore Kress could not compel her to come to New York (R. 385-86). Miss Baggett was still available and accessible to petitioner as a witness through other normal discovery procedures, which petitioner never bothered to pursue.

This statement is ~~totally~~ erroneous. In response to her request petitioner received, in addition to the statements of Irene Sullivan and Dolores Freeman, upon which she relied so heavily, a statement from Miss Baggett herself. This statement was marked by petitioner as Exhibit 4 to Mr. Powell's deposition (A. 146).

Miss Baggett's statement, printed as an Addendum to the Joint Appendix and annexed hereto, belies petitioner's latest claim, declaring:

"I made no contact with the local police which resulted in this woman's arrest, or had any contact with a policeman at all for that matter, on this date, August 14, 1964, or any other day. As far as I know no Kress employee was related in any way whatsoever to the subsequent arrest of this woman."

The courts below were unanimous with respect to the propriety of summary judgment. Petitioner's unfortunate misstatement at this late date should not serve to detract from those rulings. The judgments below should be affirmed.

November 7, 1969

Respectfully submitted,

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Of Counsel.

ADDENDUM TO JOINT APPENDIX**Statement of Jo Ann Baggett**

My name is Jo Ann Baggett. I am employed by S. H. Kress and Co. as Manager of the Food Department in their Hattiesburg, Mississippi store.

On August 14, 1964 I was working at the sandwich board during the noon rush period. Seven Negroes accompanied by a white woman entered the store and seated themselves in two of our booths at the lunch counter.

Dolores Freeman, a waitress asked me what to do. I directed her to take the Negroes' orders and looked over to the store manager, Mr. Powell, who was standing nearby, for instructions on taking the white woman's order. He shook his head indicating that he did not feel that we could serve her at that time. Miss Freeman did take the Negroes' orders, however, when service was refused the white woman the entire group got up and left without waiting for their food.

After the group left the store, I had an opportunity to talk with Mr. Powell. He explained that his decision on the fact that the store was filled with customers and that he felt that personal harm to the white woman, other customers, and store personnel might result if the girl had been served.

At the time they were here, the store was in fact filled with customers and there were quite a few militantly milling about the area. Also there were more people outside the store looking in through the front window. It seemed to be a real explosive situation.

It is our policy to serve anyone regardless of race, creed, color, or national origin. We held a meeting with

all of our Food Department employees after the passage of the Civil Rights Bill to advise them of our policy.

We served on the afternoon of August 14, 1964, a white man and a Negro who entered together and sat at our lunch counter. . However when they came in there were fewer people in the store and the danger of an incident was greatly reduced. As a matter of fact we had served the white woman, who has made the complaint, on occasions prior to August 14, 1964, and would have been more than willing to serve her then had it not been for the consideration for her safety as well as the safety of the other people in the store.

I made no contact with the local police which resulted in this woman's arrest, or had any contact with a policeman at all for that matter, on this date, August 14, 1964, or any other day. As far as I know no Kress employee was related in any way whatsoever to the subsequent arrest of this woman.

The above statement is correct to the best of my knowledge.

JO ANN BAGGETT

11/18/64

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FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—V.—

S. H. KRESS AND COMPANY,

Respondent.

**PETITIONER'S REPLY TO RESPONDENT'S
STATEMENT AFTER REPLY**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—v.—

S. H. KRESS AND COMPANY,

Respondent.

**PETITIONER'S REPLY TO RESPONDENT'S
STATEMENT AFTER REPLY**

Petitioner has been criticized for her reply to respondent wherein she argues—and sets forth facts gleaned from the record in support of that argument—that respondent did not establish by sworn testimony prior to trial an adequate basis for the District Court to grant summary judgment against the petitioner on the conspiracy count.

It is true that respondent produced and had attached to Mr. Powell's deposition (Exhibit 4, A 146) an unsworn statement of Miss Jo Ann Baggett denying contact with the local police. The contents of this statement do not appear anywhere in the record on appeal, nor does the statement appear to have been before the court when it decided the motion for summary judgment. By contrast, the unsworn statements of Dolores Freeman and Irene Sullivan were brought to the trial court's attention in petitioner's

papers opposing the motion for summary judgment (R 925-927). At the time of making such unsworn statement, however, on November 18, 1964 and as of April 1, 1965, Miss Baggett was still employed by respondent Kress (A 9). Accordingly, it becomes even more significant that respondent chose not to produce a sworn statement by Miss Baggett to deny an inference which otherwise is a reasonable inference—that she or some other employee of Kress had contact with the policeman who came into the Kress store on August 14, 1964, when petitioner and her group were awaiting service at the lunch booth—or that, in the alternative, police headquarters were called or that such headquarters contacted Kress.

Accordingly, respondent's resistance to petitioner's desire to depose Miss Baggett and have her sworn testimony prior to trial on the motion for summary judgment partakes of even greater importance. Attached herewith as a further addendum to the joint appendix is Judge Tenney's ruling below preventing petitioner from deposing Miss Baggett under oath (see R 386, 387).

Hence, it was respondent's obligation as the moving party on application for summary judgment with the burden of proof, to offer all relevant evidence to convince the trial court that there was no substantial fact issue, the failure to either produce Miss Baggett as a witness or offer her affidavit controverting the inferences in the record cannot be overlooked. Respondent did not offer the unsworn statement at the time of the motion for summary judgment, but now seeks to rely on it to rebut petitioner's argument even though respondent had exclusive access to Miss Baggett.

It is unfortunate that the courts below regarded each of the issues urged by petitioner from the narrowest view.

The proper place for respondent to place such testimony as it proffers here—from outside the record on appeal—is before a trial court where it would have to be placed under oath and would be subjected to cross examination and to controverting evidence from other parties. For that right and privilege petitioner comes before this Court. The summary judgment by Judge Bonsal on the issue of conspiracy that so narrowed petitioner's case before the trial court should be reversed along with the latter's mistaken ruling on the petitioner's surviving claim.

Respectfully submitted,

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November 1969.

ADDENDUM TO JOINT APPENDIX

[R 386]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
64 Civ. 3426

SANDRA ADICKES,

Plaintiff,

—against—

S. H. KRESS & COMPANY,

Defendant.

MEMORANDUM-ENDORSEMENT

TENNEY, J.

Plaintiff moves herein, pursuant to Rule 37 of the Federal Rules of Civil Procedure, to strike defendant's answer for its failure to produce a Miss Jo Ann Baggett for her deposition. In the alternative, plaintiff would have this Court compel defendant to produce Miss Baggett for her deposition in the capacity of a managing agent.

This is an action for damages for a claimed violation of the Civil Rights Act of 1871 (42 U.S.C.A. Section 1983).

The action arises out of the defendant's refusal to serve plaintiff at its lunch counter store in Hattiesburg, Mississippi, and her subsequent arrest by the Hattiesburg police department for vagrancy.

While Miss Baggett may be an employee of S. H. Kress and manager of the food department, she was under the

close supervision of Mr. Powell, the store manager, as was indicated upon his oral deposition. It was also indicated on his deposition that Miss Baggett was without power to make managerial decisions and that it was his decision that plaintiff not be served at the lunch counter. Plaintiff has submitted no evidence to show otherwise.

"A managing agent, as distinguished from one who is merely 'an employee', is a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporation matters; he does not act 'in an inferior capacity' under close supervision or direction of 'superior authority'." *Krause v. Erie R. Co.*, 16 F.R.D. 126, 127 (S.D.N.Y. 1954).

[R 387]

Plaintiff not having established that Miss Baggett was a managing agent, the motions to strike the defendant's answer and to compel defendant to produce Miss Baggett for oral deposition are denied.

SO ORDERED

Dated: New York, N. Y.
August 5, 1965

S/ CHARLES M. TENNEY
U.S.D.J.



4. Whether the District Court validly exercised its discretion in enforcing its Calendar Rules and precluding testimony of surprise witnesses where the witnesses were not previously specified in the pre-trial order, not identified until the day before trial, and their testimony was conceded by petitioner to be cumulative.

The Court below answered each of these questions in the affirmative*.

Statement

This action, commenced November 12, 1964, sought damages in the amount of \$550,000 from Kress for an alleged violation of the Civil Rights Act of 1871, 42 U. S. C. §1983.

Briefly stated, the original complaint alleged, as a first cause of action, that on August 14, 1964, petitioner, a white person, accompanied six Negro students to the public library in Hattiesburg, Mississippi, where a request by the students to use the library facilities was refused and they were asked to leave. Petitioner and the students thereafter entered the local Kress store, where a waitress employed by Kress refused to take her order while taking those of the Negro students.

The original complaint further charged, as a second claim, that after petitioner left the Kress store, she was arrested and jailed by officers of the Hattiesburg police department for vagrancy, pursuant to an alleged conspiracy between Kress and the Chief of Police of Hattiesburg.

* Since Judge Waterman's dissent (Appendix C) related only to question three, the Court was unanimous in affirming the District Court on all the other questions presented.

ARGUMENT

I

Summary Judgment Was Correctly Granted Where There Was No Proof of Conspiracy

Petitioner's allegations concerning the conspiracy charged in the complaint are, patently, constructed of purest gossamer. It would needlessly burden this Court to recite all the proof assembled by respondent, which was wholly uncontroverted by petitioner, and which demonstrated that petitioner did not have a single shred of evidence to support her claim of conspiracy. The facts, as found by the Courts below, and by the Fifth Circuit in *Achtenberg v. Mississippi*, 393 F. 2d 468 (5th Cir. 1968), all buttress the inescapable conclusion that Kress was not a party to any conspiracy and, in fact, no conspiracy even existed. Since petitioner did not offer a scintilla of proof to support her claim, respondent was clearly entitled to summary judgment on this issue. *Scolnick v. Lefkowitz*, 329 F. 2d 716 (2d Cir.), *cert. denied*, 379 U. S. 825 (1964).

Stringing together three unrelated events, the occurrence at the library, the refusal of service and her arrest, petitioner has persisted in her futile attempt to concoct a conspiracy. The District Court rejected petitioner's flimsy conjecture and the Court of Appeals unanimously affirmed this ruling.

The allegation that Kress was connected with the events at the library is probably petitioner's most far fetched charge. To claim, in view of the record, that the events at the library were connected with any "conspiracy" is preposterous. Kress' store manager was examined by petitioner's counsel and emphatically testified that he did not even know Miss Adickes prior to the time she entered the Kress store and certainly did not know of the events at the library (R. 757, 758 *). In addition,

* References to the record are designated "R."

Miss Adickes admitted that as far as she knew no one at Kress was aware of what had happened at the library (R. 735). More importantly, after full discovery, Miss Adickes was still unable to connect Kress with the library and admitted she had absolutely no evidence of a conspiracy.* The only possible conclusion therefore is that Kress was totally unaware of the happenings at the library, did not discuss the events with anyone at the library or with the police and was not a party to a "conspiracy."

Petitioner further claimed that she was arrested pursuant to this illusory conspiracy, but here too, she failed to produce any evidence to support the allegations. Kress' store manager swore that he had never discussed Miss Adickes or her arrest with the Chief of Police (R. 757-758), and petitioner admitted that she had no knowledge of any facts supporting the claim that Kress conspired with the police:

"Q. Do you have any knowledge of any communication between Kress, or its officers, directors or employees, with any member of the Hattiesburg Police Department or any officer of the police department? A. No.

"Q. Did any officer, director or employee of Kress make any statement to you or anyone else

* "Q. Miss Adickes, do you have any knowledge of any communication between Kress or any of its officers or directors or employees with anyone connected in any way with the Hattiesburg public library? A. No, I have no knowledge, no direct knowledge.

Q. No what? A. No direct knowledge.

Q. Do you have any knowledge? A. No.

Q. During the entire course of time that you were in or about the Hattiesburg Public Library did anyone say anything about or mention the names of Kress or any of its officers or employees? A. No." (R. 734-735)

to your knowledge which in any way mentioned the Hattiesburg Public Library or the Hattiesburg Police Department? A. No.

“Q. Did any member of the Hattiesburg Police Department or any other public official of Hattiesburg make any statement to you or anyone else, to your knowledge, which in any way related to Kress or any of its officers, directors or employees? A. No.” (R. 735)

In sum, petitioner conceded a total absence of any proof of conspiracy between Kress and the police. Indeed, not only did petitioner admit that she had no evidence, but her own testimony negated any possible trace of an inference. Thus, petitioner testified that upon leaving the library and while going to Woolworth's, before she even decided to go to Kress, she and her companions were being followed and watched by the police (R. 728-729).

Furthermore, the affidavits of the police officers who arrested petitioner made it clear that the arrest of petitioner was not pursuant to any conspiracy with Kress, but rather was due to the independent action of the officers (R. 762-764). Indeed, petitioner made no attempt to rebut these affidavits, nor does she claim that there were any additional available facts.* Cf. *Robin Const. Co. v. United States*, 345 F. 2d 610, 613-14 (3d Cir. 1965); *Schneider v. McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (2d Cir. 1958).

With respect to the occurrence at its store, Kress does not deny that petitioner was refused service; it has, however, repeatedly denied that such refusal was “conspiratorial” or was based upon race, color or creed. In fact,

* Petitioner now seems to rely upon the mere sequence of events. In this connection petitioner points to the fact that a policeman entered Kress while she was present. However, as petitioner knows,

(footnote continued on next page)

Kress was a leader in civil rights in the South, with an express policy against racial discrimination (R. 760-761). The company had made certain that its facilities were available to all, and it was for just this reason that petitioner and the students came to Kress (R. 68). The proof was clear that Kress had served mixed groups in its Hattiesburg store prior to August 14 and that the decision not to serve petitioner was unilateral, triggered solely by the fear of the store manager for the safety of petitioner, her companions and the customers in the store at the time (R. 749, 755).

Petitioner failed to come forward with even a fragment of proof to show a conspiracy between Kress and anyone. The lower Courts properly refused to permit petitioner's vague unsupported allegations to serve as a substitute for the hard facts which Kress assembled, particularly since petitioner admitted that she had absolutely no knowledge of any communications between Kress and the police of Hattiesburg (R. 735).

Where, as here, there is no evidence which could properly go to the jury, and since the court would have been required to direct a verdict in respondent's favor at the end of petitioner's case if there were a trial, summary judgment was proper. *Morgan v. Sylvester*, 125 F. Supp:

(footnote continued from previous page)

this is a slender reed upon which to rely. Petitioner's sworn testimony states that, from the moment she left the library, the police followed her (R. 728-729). Further, even according to the testimony of petitioner's own witnesses (which petitioner never tendered on the summary judgment motion), the policeman did nothing but look at the group, walk to the back of the store and leave (R. 158-159). Contrary to petitioner's unsupported statement that the policeman "communicated" with a Kress employee, the record is clear that no such thing ever happened. Since the proof is that Kress did not know of the events at the library or call the police, to fabricate a case upon the entry of a police officer into the Kress store is fantastic.

380 (S. D. N. Y. 1954), *aff'd*, 220 F. 2d 758 (2d Cir.), *cert. denied*, 350 U. S. 867 (1955).

Reference to the *Achtenberg* case, *supra*, is simply a bootstrap attempt to insert a factual issue where none exists. The most cursory reading of that opinion, which was before the Second Circuit when it reached its decision, reveals that the vagrancy arrests there were unrelated to Kress. All that the Fifth Circuit found in *Achtenberg* was that the arrests there were a sham. There was no proof, and no finding, that Kress was in any way connected with the arrests. Indeed, it was not an issue in *Achtenberg*. In the instant case, however, where this was at issue, both Courts below found that plaintiff had utterly failed to offer the slightest proof of any participation by Kress in a conspiracy. Whatever claim petitioner might have against the police, she certainly has none against Kress. Thus, the District Court was correct when it found

"no evidence in the complaint or in the affidavits or other papers from which a 'reasonably-minded person' might draw an inference of conspiracy. . . .

". . . The plaintiff may not defeat defendant's motion for summary judgment on the mere hope that she will be able to discredit these denials by cross-examination at trial." (App. B-7)

In unanimously affirming this holding, the Court of Appeals was even more blunt:

"Plaintiff's claim was wholly conclusory; she alleged no facts that would tend to suggest a conspiracy; and the chances of her proving such a conspiracy at the trial were nil." (App. B-23)

Under all these circumstances, it would have been an abuse of discretion for the Courts below to reach any

decision other than that summary judgment was proper. See, e. g., *First Nat. Bank v. Cities Service Co.*, 391 U. S. 253 (1968).

II

The Civil Rights Act of 1875 Is Inapplicable to This Action

After this action was almost a year and a half old, petitioner attempted to amend her complaint to allege a cause of action under the Civil Rights Act of 1875, Ch. 114, 18 Stat. 335, which, by its terms, guaranteed

“full and equal enjoyment of the accommodations, advantages, facilities and privileges of *inns, public conveyances on land or water, theatres and other places of public amusement. . . .*” (Emphasis supplied.)

This statute was declared unconstitutional by this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), and while it has never been repealed by Congress, it does not appear in the United States Code.

The genesis of the proposed revival of this unconstitutional statute, which petitioner has sought to adopt, is the law review article, Nimmer, “A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875,” 65 Col. L. Rev. 1394 (1965). The flaw in such an adoption by petitioner, irrespective of the validity of the doctrine, is simply that the statute is not relevant to the facts here. Indeed, as Nimmer, the author of the doctrine, pointed out, the statute clearly would not apply to lunch counters. The District Court aptly noted this when it said

“However, not even the broadest interpretation of ‘inns’ as used in the 1875 Act could encompass the

defendant's lunch counter. See, Nimmer, 'Judicial Validation', *supra*, at pp. 1396-1397 and cases cited. For this reason, it is unnecessary to decide whether Sections 1 and 2 have been or can be revived, and plaintiff's motion to amend her complaint to add a cause of action thereunder is denied." * (App. B-8)

Under the facts of this case, any supposed question raised by the Nimmer proposal is purely theoretical.

III

The District Court Was Correct in Holding That Petitioner Did Not Meet the State Action Requirement of 42 U. S. C. §1983

The basic requirement for liability under 42 U. S. C. §1983 is that the party act "under color of any statute, ordinance, regulation, custom, or usage" of the State. Nor is this surprising, for this Reconstruction Era statute, finding its genesis in the Fourteenth Amendment, was aimed at the deprivation of civil rights by state governments, and was not intended to apply to private acts by private citizens. *Civil Rights Cases*, 109 U. S. 3 (1883). Indeed, it was this gap in application to individuals which led Congress to pass the Civil Rights Act of 1964, 78 Stat. 241, 42 U. S. C. §2000 *et seq.* *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241 (1964).

Petitioner, however, has chosen not to sue under the 1964 Civil Rights Act to seek injunctive relief against any alleged wrong, but rather has sought more than half a million dollars in damages. The only statute which can afford a basis for such a monetary claim is Section 1983 with its state action requirement. The 1964 Act does not

* The last sentence quoted from the opinion was inexplicably omitted from petitioner's Appendix.

require state action for liability, but it does not provide for damages, either. *Katzenbach v. McClung*, 379 U. S. 294 (1964). Petitioner cannot extrapolate from both statutes to avoid satisfying the requirements of either one. Having chosen to sue under Section 1983, petitioner must meet the standards of that Section and prove the existence of state action.

To establish state action under 42 U. S. C. §1983, petitioner must show that there has been significant state involvement in the alleged private discrimination. *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722 (1961). The crucial test is whether state power "has in fact been exercised." *New York Times Co. v. Sullivan*, 376 U. S. 254, 265 (1964).

Petitioner has attempted to rely upon three Mississippi statutes and a legislative resolution to support her claim of state action here. Two of these statutes and the resolution have nothing to do with the instant situation.* The

*The Senate Concurrent Resolution No. 125 enacted in 1956 is merely a condemnation of this Court's decision in *Brown v. Board of Education*, 347 U. S. 483 (1954). Section 4065.3 of the Mississippi Code purports to require the executive branch of the state government to prohibit the mixing of races by the Federal Government in certain public places, not including restaurants or stores such as Kress. Mississippi Code Section 2056(7) is likewise inapposite. This 1954 statute is a broad conspiracy statute which, *inter alia*, makes it a crime to conspire to overthrow or violate the segregation laws of the state. Since there was no allegation in the first cause of action of the complaint that Kress conspired with anyone else, the reference to this statute would only be encompassed in the second, or conspiracy claim. Moreover, there are no laws covering segregation in restaurants which could be conspired against.

It is clear that, on their face, the above enactments have nothing to do with the instant case and cannot ground a claim of state action in a suit concerning a refusal of service by a restaurant in 1964.

third statute, Mississippi Code Section 2046.5, reiterates the old common law rule that a restaurant owner who does not offer lodging, may choose such customers as he pleases and enforce his decision, if necessary, by resort to proper law enforcement officials. *Cf. Williams v. Howard Johnson's Inc.*, 323 F. 2d 102 (4th Cir. 1963); *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. 2d 773 (1944).

At common law, a restaurant owner, unlike an innkeeper, was free to select patrons on any basis deemed satisfactory to him. 21 Halsbury's, *Laws of England*, §941, p. 447 (3d ed.). However, a person who held himself out as one who would aid travelers and offer them lodging did not have that right, for

“ . . . if an innkeeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way. . . . ” 3 Blackstone, *Commentaries* 164 (Lewis ed. 1902) at 166. (Emphasis added.)

Thus, a victualler, who does not furnish lodging, such as a restaurant owner (Tidswell, *The Innkeeper's Legal Guide*, p. 22 (1864)), is entirely distinct from an innkeeper, who by furnishing accommodations takes on a heavy duty. *Orchard v. Bush & Co.*, [1898] 2 Q. B. 284; *Thompson v. Lacy*, 3 B. & Ald. 283 (K. B. 1820). This proposition was well stated in *R. v. Rymer*, [1877] 2 Q. B. 136 at 139, 140, where the court held that

“The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate en-

trance, and appears to have been a mere shop in which spirits are retailed across the counter. . . . Such a place is not an inn within the meaning of the common-law rule. An inn is a place 'instituted for passengers and wayfaring men:' *Calve's Case*. A tavern is not within the definition. In such a place as this no one has a right to insist on being served any more than in any other shop."

See also, *Carpenter v. Taylor*, 1 Hilt. [N. Y.] 193, 195 (1856); *Ultzen v. Nicols* [1894] 1 Q. B. 92; Beale, *Innkeepers and Hotels*, §35, p. 26 (1906). There being no statutory provisions to the contrary, these common law rules are in effect in Mississippi. *City of Jackson v. Wallace*, 189 Miss. 252, 196 So. 223, 225 (1940); *Western Union Telegraph Co. v. Goodman*, 166 Miss. 782, 146 So. 128 (1933).

Where there is no positive provision of state law requiring or encouraging segregation of eating facilities, and the only state statute on the subject merely restates a common law right, there can be no state action upon which to base a monetary claim against Kress under Section 1983. *Williams v. Howard Johnson's Inc.*, 323 F. 2d 102 (4th Cir. 1963); *Harrison v. Murphy*, 205 F. Supp. 449, 453 (D. Del. 1962).

Nor, as the Court of Appeals held, can petitioner rely upon *Reitman v. Mulkey*, 387 U. S. 369 (1967) to support her arguments. The decisions of the Courts below in the instant case are completely consistent with the doctrine set forth in *Reitman*, where this Court upheld the California Supreme Court's decision that Article I, §26 of the California Constitution involved the state in racial discrimination in housing in violation of the Equal Protection Clause of the Fourteenth Amendment. In the *Reitman* case, this Court noted that California had affirmatively acted to change its existing anti-discrimination housing

laws in a much-publicized, statewide initiative and referendum. This, of course, is entirely different from the present case where the section in question is merely a restatement of common law, which, in fact, had absolutely no bearing on Kress' conduct. Moreover, Art. I, §26 had become part of the California Constitution, which placed it on quite a different level than a mere statutory enactment. This was crucial, for

“[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from all censure or interference of any kind from official sources.” 387 U. S. at 377.

Finally, this Court, relying heavily upon the California Supreme Court, was very careful to point out in *Reitman* that it did not “rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations”, such as the Mississippi statute. 387 U. S. at 376. Even under the broad concepts of state action as set forth in *Reitman*, it cannot be said that Section 2046.5 has significantly involved the state in Kress' private, allegedly discriminatory acts. The Section is innocuous on its face and has never been enforced.

In a final attempt to conjure up state action, petitioner argues that there was a custom and usage in Hattiesburg, Mississippi of refusing service to white persons in the company of Negroes. Petitioner failed totally to introduce any evidence of a relevant custom and usage in Hattiesburg. All that was required was competent testimony of specific instances taking place in Hattiesburg prior to

August 14, 1964, from witnesses with personal knowledge of the alleged occurrences. Cf. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F. 2d 641, 647 (3d Cir. 1958); *Hunter-Wilson Distilling Co. v. Foust Distilling Co.*, 84 F. Supp. 996, 1003 (M. D. Pa. 1949); see also *Ames Mercantile Co. v. Kimball S. S. Co.*, 125 Fed. 332 (N. D. Cal. 1903).

Petitioner testified at trial that she had never been in the state of Mississippi prior to June, 1964 and had never visited Hattiesburg until July of that year (R. 63). She was compelled to admit that she had no personal knowledge of any facts which would support the existence of the claimed custom (R. 68). Petitioner's only other witnesses, all life-long residents of Hattiesburg, testified that they knew of no instance in which a white person had been refused service in that city while in the company of Negroes who were served (R. 106, 120, 134). With this total absence of evidence, the District Judge had no choice but to grant a directed verdict, since there was nothing which could properly be submitted to the jury. Cf. *Gordon v. Illinois Bell Telephone Co.*, 330 F. 2d-103 (7th Cir.), cert. denied, 379 U. S. 909 (1964).

It does not help petitioner to argue that there was a custom in Mississippi generally of "fostering the segregation of races" (App. C-4). Even if there were such a custom it would have no bearing on Kress or upon this case, for Kress had only one set of eating facilities in its store at which it served all customers (R. 1042). There is not, and cannot be, any claim that Kress ever segregated the races in its Hattiesburg store (R. 104, 117, 131). To reach back to 1880 to try to paint Kress with the broad brush of Mississippi history is, in light of the facts, not only irrelevant to this case but unwarranted as well. Kress cannot and should not, in good conscience, be branded in this manner.

The proof in the record establishes that Kress was not aware of, and did not act pursuant to, any custom or usage

(R. 723, 758, 1035) but rather for good cause to avoid serious violence at the moment (R. 753, 758). Kress served both Negroes and whites, whether they came in together or separately, both before and after August 14th and indeed on that very same day (R. 750-751, 756, 758). Kress had, and still has, a firm written policy prohibiting any discrimination in its stores based upon race, color or creed (R. 759-760). Because violence was averted on August 14th, the Hattiesburg store has remained open, and has continued to serve all people, black and white together, at its facilities, without incident (R. 751, 758).

Thus it is clear that this case involves only one isolated incident, totally unrelated to any claimed custom, usage or statute of the State. The case arose out of the most unusual circumstances, which never occurred before or after that day. Since petitioner was unable to show any state action, she clearly failed to make out a *prima facie* case under 42 U. S. C. §1983.

IV

The District Court Correctly Excluded Two Surprise Witnesses First Designated at Trial

On December 9, 1965, pursuant to Rule 13 of the Calendar Rules of the United States District Court for the Southern District of New York, that Court ordered the parties to exchange lists of witnesses and to file pre-trial memoranda setting forth "a list of witnesses which each party intends to call along with the specialties of experts to be called" (R. 772). Petitioner listed, in addition to herself, only the six students.

The parties thereafter agreed to a pre-trial order of the District Court which provided that the only witnesses at trial would be those previously designated, and

"[s]hould any party hereafter decide to call any additional witnesses, prompt notice . . . shall be

given. . . . It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum." (Emphasis the Court's) (R. 1047)

A similar requirement was set forth in the pre-trial order with respect to any expert witnesses.

Despite the fact that a pre-trial conference was held before the trial judge two weeks prior to trial, at which time petitioner's counsel made no mention of new witnesses, on the day before trial, petitioner served a paper entitled "Amendment to Trial Memorandum" advising respondent, for the first time, of her intention to call an expert witness. In her trial memorandum, served the same day, petitioner merely mentioned, in passing, proposed testimony of a second witness whose name had never before appeared in the case. In neither instance did petitioner "set forth the reason why the witness was not theretofore identified" as required by the District Court.

When respondent's counsel objected to the calling of these surprise witnesses, it became clear that despite the fact that the issues to be tried had been agreed to almost a year earlier, petitioner's counsel had made no effort to secure these witnesses until the week before the trial (R. 7-8) and did not, even at that late date, inform respondent of the fact of the additional witnesses, much less their names. The problem was further complicated by the fact that petitioner's counsel confessed she had not met the proposed witnesses and did not really know what their testimony would be (R. 5, 13-14).

Petitioner's excuse here is identical with that offered in *Thompson v. Calmar S. S. Corp.*, 331 F. 2d 657, 662 (3d Cir.), *cert. denied*, 379 U. S. 913 (1964) where the court ruled that

"The only excuse offered by the defendant is that it was uncertain that the witness would be available

at the time of trial. In these circumstances it would be wholly contrary to the spirit of our Rules and destructive to orderly procedure to permit him to testify."

The effect of such a tactic in this case would have been to strip Kress' counsel of an opportunity to prepare for cross-examination. The courts will not tolerate such a result. *Clark v. Pennsylvania R. R.*, 328 F. 2d 591, 594-595 (2d Cir. 1964); *Hoeppner Const. Co. v. United States*, 287 F. 2d 108 (10th Cir. 1960); *Globe Cereal Mills v. Scrivener*, 240 F. 2d 330 (10th Cir. 1956).

The vacuity of petitioner's argument is demonstrated by the fact that her counsel advised the court that a postponement of the case would not help because "on the date the case could be put over I could well not have had" the witness (R. 14).

Further, petitioner admitted in her brief below that while the two excluded witnesses would have testified with respect to custom and usage in Mississippi in 1964, the exclusion of these witnesses was not "pivotal since evidence was adduced through plaintiff as to the custom and usage in Hattiesburg." Obviously where, as here, the testimony of the witnesses would have been cumulative and of no probative value, it is within the sound discretion of the trial court as to whether it should be admitted. *Mahoney v. N. Y. Cent. R. R.*, 234 F. 2d 923 (2d Cir. 1956); *Jahn v. Pedrick*, 229 F. 2d 71 (2d Cir. 1956).

The facts here demonstrate that not only was it a proper exercise of discretion to exclude the witnesses pursuant to Rule 16(a-b) of the Calendar Rules of the United States District Court for the Southern District of New York, but, indeed, it would have been an obvious abuse of discretion and prejudicial to respondent to do otherwise. Cf. *Thompson v. Calmar S. S. Corp.*, *supra*; *Taggart v. Vermont Transp. Co.*, 32 F.R.D. 587 (E. D. Pa. 1963), *aff'd per curiam*, 325 F. 2d 1022 (3d Cir. 1964).

Conclusion

The Petition raises no issues of substance or importance, but rather only questions based upon a unique fact situation involving the interests of one particular litigant. Under these circumstances, this Court has traditionally declined to exercise its discretionary jurisdiction. *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393 (1923).

Petitioner having failed to set forth any basis for review by this Court, the Petition for Writ of Certiorari should be denied.

April 22, 1969

Respectfully submitted,

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U. S. SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—v.—

S. H. KRESS AND COMPANY,

Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—v.—

S. H. KRESS AND COMPANY,

Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court granting in part and denying in part respondent's motion for summary judgment is reported in 252 F. Supp. 140 and appears at A. 180.¹ The opinion of the Circuit Court of Appeals is unreported and appears at A. 201.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered December 27, 1968 (A. 200). This Court granted certiorari on May 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (Act of June 25, 1948, Ch. 646, 62 Stat. 928).

¹ References to the separate appendix appear by page number following ("A. 00").

Questions Presented

1. Whether petitioner—denied food service at a Kress Hattiesburg Mississippi store because she, a white, was in the company of Negroes—was deprived by respondent, acting under “color of law,” of rights secured to her by the constitution, as she alleges in a suit for damages brought pursuant to the fourteenth amendment and 42 U.S.C. §1983.

2. Whether the petitioner—denied food service at a Kress Hattiesburg Mississippi store because she, a white, was in the company of Negroes—was deprived by respondent, acting under “custom or usage,” of rights secured to her by the constitution, as she alleges in a suit for damages brought pursuant to the fourteenth amendment and 42 U.S.C. §1983.

3. Whether petitioner, deprived of her constitutional rights as described in questions 1 and 2 above, is entitled to statutory damages against respondent pursuant to the Civil Rights Act of 1875, for being denied the right to the use of a public accommodation.

4. Whether summary judgment on the basis of affidavits and unsworn statements should have been granted against petitioner on her complaint of conspiracy between the respondent and the Hattiesburg Police in connection with the deprivation of her constitutional rights as described in questions 1 and 2 above.

5. Whether it was error and an abuse of discretion under all circumstances for the trial court to deny petitioner the

benefit of expert testimony as to custom and usage in Hattiesburg, Mississippi in August 1964 regarding the serving of white persons in the company of Negroes where notice was given of the identity of the witnesses one day before trial.

Statutes Involved

The federal statutes involved are 42 U.S.C. §1983 [Act of April 20, 1871, Ch. 22 §1, 17 Stat. 13] and Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335], as are the thirteenth, the fourteenth and fifteenth amendments to the constitution.

Legislative acts of the Mississippi legislature involved are: Chapter 466, Senate Concurrent Resolution No. 125 (1956), Mississippi Code Sections 2046.5 (1956), 2056(7) (1954) and 4065.3 (1956). Pertinent statutory and constitutional provisions are set forth commencing at p. 51 of this brief.

Preliminary Statement

This is a law suit by a New York school teacher who was refused service discriminatorily in a public establishment in Mississippi offering food for sale and consumption because she, a white, was in the company of Negroes.

She sought damages pursuant to the fourteenth amendment and under 42 U.S.C. §1983 [this brief, pp. 51, 52] on the grounds that such discriminatory refusal of service was 1.) supported by state action in accord with a variety of legislative dictates passed by the Mississippi legislature in the later part of the 1950's which directed such discriminatory action on the part of private individuals as well as

public officials and 2.) supported by "custom or usage" as specified in the statute, the custom in Hattiesburg and other parts of the South being opposed to the social "mixing" of the races in public places.

In addition, the petitioner sought statutory damages under the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335, this brief pp. 52-56], declared unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883).

She further charged a conspiracy between municipal police officials and defendant Kress Co. based upon the *prima facie* showing that the Police of Hattiesburg had arrested her immediately following the discriminatory refusal of service by Kress, the Police charging her with vagrancy for having requested such service and for her involvement earlier that same day in an attempt to integrate the Hattiesburg Public Library in company with the same six black students whom she had escorted to the Kress store one-half hour later. In contrast to the court below, the Fifth Circuit Court of Appeals found that the criminal prosecution of this same plaintiff for having engaged in such rightful and lawful activity was "in violation of the express prohibition of Section 203 of the Civil Rights Act for rights granted [her] under Section 201." See, *Achtenberg, Adickes et al. v. State of Mississippi*, 393 F. 2d 468 (5 Cir., 1968).

Petitioner was foreclosed in the motion part from attempting to revive the Civil Rights Act of 1875 and from pursuing at trial her conspiracy allegations (A. 184, 185).

That court permitted her to go to trial on the issue of damages under 42 U.S.C. §1983 on the narrow grounds that Mississippi Code §2046.5 could furnish grounds for al-

leging "state action" because this code section "provides a criminal sanction against anyone who is requested to leave [a restaurant], but refuses to do so" (A. 183). That court further suggested that in order to establish "state action," petitioner would have to show that respondent had knowledge of Mississippi Code §2046.5 or was influenced by it (A. 183).

At the conclusion of the petitioner's case, the court directed a verdict for the defendant (A. 323).

Statement of the Case

Petitioner commenced this action on November 12, 1964, by the filing of a complaint predicated on the fourteenth amendment to the constitution and 42 U.S.C. §1983.

Allegations of the Complaint

Petitioner alleged that she is a resident of New York where she is a school teacher employed by the New York City schools. She alleged that the respondent is a New York corporation which maintains a store and lunch counter and booths for eating in Hattiesburg, Mississippi (A. 2).

In the summer of 1964, she volunteered to engage in the Mississippi Project sponsored by the Council of Federated Organizations, the purpose of which was to foster the integration of Negro citizens into the political and economic life of Mississippi and to improve their educational opportunities (A. 3).

On August 14, 1964, the petitioner accompanied by six Negro students entered the Hattiesburg public library, a

public institution maintained by the taxpayers of Hattiesburg, Mississippi. The Negro students requested the use of the facilities of the library. Their request was rejected, and they were told to leave. When they refused to do so, the library was closed by the Chief of Police (A. 3).

Petitioner and the students left the library and entered the premises of respondent's Hattiesburg store for the purpose of ordering lunch. A waitress employed by the respondent and acting in the course of her employment took the orders of the Negro youths. The waitress refused, however, to take the order of petitioner or to serve petitioner on the grounds that petitioner was a white person in the company of Negroes (A. 3, 4).

Petitioner was thereby discriminated against because of race and in violation of the constitution and 42 U.S.C. §1983. Petitioner alleged, therefore, that she was damaged in the sum of \$50,000.00 (A. 4).

In her second cause of action, petitioner realleged the allegations of her first cause of action. In addition, she alleged that, while petitioner and the Negroes were in respondent's store, a uniformed policeman (identified in statements submitted by respondent, as Patrolman Hillman) acting under instructions of the Chief of Police entered respondent's store and thereafter, immediately upon petitioner's leaving the store, arrested her for vagrancy and took her into custody. On information and belief, petitioner alleged a conspiracy between the Chief of Police of Hattiesburg and the respondent to deprive her of her right to enjoy public accommodation because she had accompanied Negro students to the public library and thereafter sought to eat in their company in a public

place. In consequence of this capricious arrest—the result of joint action on the part of the respondent and the police officials of the City of Hattiesburg—the petitioner alleged that she suffered special damages by reason of her arrest and general damages in the sum of \$500,000.00 (A. 4-6).

Pretrial Proceedings

After answer (A. 7, 8) the parties conducted pretrial discovery including the submitting of interrogatories and the taking of the deposition of the petitioner and the deposition of the respondent's store manager (A. 9-161).

Thereafter, on November 29, 1965, the respondent moved for summary judgment (A. 104). In support of that motion respondent relied on denials by the store manager of any conspiracy, and his affirmative assertion that he ordered the denial of service to petitioner because of an "explosive situation" and to avoid a riot (A. 135). In addition, the respondent submitted affidavits of two members of the police force and the Chief of Police denying any conspiracy (A. 107, 110, 113, 114).

In opposing the motion, petitioner relied on inferences to be drawn from the circumstances as set forth by her in her deposition (A. 62, 70, 72, 73, 77, 79). Petitioner also relied on two unsworn statements submitted by respondent which did not support and were in apparent contradiction to the main allegations of the deposition of the store manager and the affidavits of the Hattiesburg police officers. Irene Sullivan, an employee of respondent, stated she exchanged greetings with Patrolman Hillman when he entered the store while petitioner and the Negro students awaited service at their tables (A. 179); it was Patrolman Hillman

who arrested petitioner immediately thereafter when petitioner left the store (A. 110, 113). Dolores Freeman, the waitress employed by respondent who refused service to petitioner, made no reference in her statement to an "explosive situation" and merely said that she had followed orders in refusing service to petitioner (A. 178).

Petitioner cross-moved to amend her complaint alleging no new facts but specifically alleging that respondent's conduct was "under color of state law, custom and usage" and that it was specifically in conformity with Mississippi Code sections and a legislative concurrent resolution. She also sought to add a new cause of action under Sections 1 and 2 of the Civil Rights Act of 1875 and sought the statutory penalty of \$500.00 for the respondent's discriminatory action (A. 161-168).

Ruling of the Court

After hearing before the Honorable Dudley B. Bonsal, the court upheld petitioner's cause of action as to the first count of her complaint on the narrow ground that the petitioner could recover if she could show that the respondent discriminated against her pursuant to a custom enforced by the state under Mississippi Code §2046.5. That section, only one of several set forth by the petitioner as evidencing Mississippi statutory approval of racially discriminatory practices in public places, provides that a proprietor of a public business may refuse to serve any person at his own discretion and that a person who enters such place must leave if requested or be guilty of trespass. [This brief pp. 62, 63.]

The court dismissed Count II of the complaint, which alleged a conspiracy between the respondent and the Hattiesburg police department, on the ground that the pretrial discovery procedure did not uncover any facts from which a conspiracy might be inferred (A. 183).

The court denied petitioner leave to add a third cause of action under Sections 1 and 2 of the Civil Rights Act of 1875, holding that those sections could apply only to an inn and could not apply to a lunch counter (A. 184).

On April 26, 1966, after Judge Bonsal had ruled, petitioner filed her Second Amended Complaint for Damages asserting on the basis of facts set forth in her initial complaint:

"Defendant's action toward plaintiff as aforesaid in denying plaintiff service was under color of state law, custom and usage and was, in addition, pursuant to Mississippi Code Section 2046.5 (1956) . . . Such action of defendant is (sic) aforesaid represents a following of the custom of the community to segregate the races in public eating places and was effected to conform with such custom and usage" (A. 187, 188-190).

The Second Amended Complaint was duly answered—the respondent admitting that a waitress employed by the respondent took the orders of the Negro students but declined to take the order of the petitioner (A. 188-190).

Pretrial Order

Thereafter, on August 3, 1966, a pretrial order was entered providing, *inter alia*, that:

"(10) The waitress took the orders of the Negroes but refused to take the order of plaintiff" (A. 191).

(11) The waitress, in refusing plaintiff service, was acting under express instructions from the store manager, Mr. Gordon T. Powell" (A. 191).

* * * * *

"A portion of the food served at the lunch counter has moved in interstate commerce" (A. 192).

Expert Witnesses Barred

The case was set for trial before the Honorable Charles H. Tenney to take place on February 14, 1967. One day prior to trial, petitioner, by written notice,² advised respondent of her intention of calling the Reverend Robert Beech of Hattiesburg, Mississippi, as an expert witness on the custom and usage in Hattiesburg, Mississippi, as to the serving of white persons in the company of Negroes on August 14, 1964. Also the day before trial, the petitioner orally advised the respondent of her intention of calling Andrew Gordon of the Rockefeller University as an expert witness on the same topic. That oral notice was later confirmed by a written proposed amendment of the plaintiff's trial memorandum.³

² Plaintiff's Trial Memorandum p. 6 (R. 3, 4).

³ This proposed amendment is unnumbered in the record as it was added by stipulation of counsel.

The trial court ruled, however, that the petitioner had not given "prompt notice" to respondent and denied petitioner permission to call such expert witnesses (A. 233).

Testimony at the Trial

At the trial, the petitioner testified that she was a school teacher in the New York City public school system and that she joined as a volunteer in the 1964 summer program in Mississippi of the Council of Federated Organizations which was to feature "freedom schools"—offering education in American history and civil rights—and voter registration in a general effort to foster the civil rights of the Negro citizens of the state. After a preliminary trip to Mississippi, Miss Adickes flew to Memphis for a three day orientation session and thereafter, on July 4, 1964, traveled to Hattiesburg, Mississippi, to begin her work in the summer program (A. 243-246).

Miss Adickes settled in a small rural Negro community outside of Hattiesburg, called Palmer's Crossing. There she joined other teachers at the Priest Creek Baptist Church in the instruction of eighty Negro students in the history of the American Negro, American social ideals and current events, including the passage of the 1964 Civil Rights Bill (A. 246-248).

During the first or second week of August, there came a time when the Negro students in petitioner's class talked about going some place together where they had not been permitted to go to before the passage of the 1964 Civil Rights Bill (A. 248, 249). In discussion outside the classroom and in the absence of petitioner, the students decided first to go to the "drive-in" motion-picture theatre in

Hattiesburg. They decided against this because of lack of transportation and because of anticipated danger in the isolated location of the drive-in theatre (A. 249).

After further discussion, the students decided to go to the Hattiesburg public library. The petitioner agreed to accompany them (A. 249).

On August 14, 1964, the petitioner and six Negro students—five girls and a boy—donned blue denim "freedom" shirts and took the bus from Palmer's Crossing for the half-hour ride to Hattiesburg and the library. The group entered the library and approached the desk and asked for library cards. Petitioner and her students sat down at the library desks and waited. After a half-hour, the Police Chief entered, questioned petitioner and then instructed the group to leave and they left (A. 250-251A).

After the petitioner and the six students left the library, they walked downtown, went to a Woolworth store, where they found the counter crowded, waited a few minutes and then left. Thereafter, they entered the respondent's store, where the group sat down in two empty booths—the petitioner sitting with three of the Negro students and the other three sharing the adjoining booth. Miss Adickes did not find the respondent's store crowded although there were a number of people in the store (A. 252).

After the group had waited for ten or fifteen minutes, a waitress appeared and distributed menus. The waitress took the orders of the three Negro youths accompanying petitioner, but did not take the petitioner's order. The group called the waitress back and when she returned the following conversation ensued:

Miss Adickes: "You haven't taken my order yet."

Waitress: "Well, I am not going to."

Miss Adickes: "Why not?"

Waitress: "Because my manager told me not to serve you."

Miss Adickes: "Do you realize that this is a violation of the Civil Rights Act?"

Waitress: "Yes, but my manager told me not to serve you. We have to serve the colored, but we are not going to serve the whites that come in with them" (A. 252, 253).

Thereafter, the petitioner asked for the manager's name and was told by the waitress that it was "Mr. Powell." The group in the other booth told the waitress that if she was not going to serve "Sandy," they did not wish to be served, and they all got up and left (A. 253).

The petitioner testified that the refusal to serve her "shocked" her. She had not anticipated such treatment because she understood that Kress was one of the places in town then serving Negroes. She also stated that "the denial provoked a kind of visceral reaction—there is a rejection, and you feel it, you feel it physically, or I felt it physically. At the same time, I was aware of the denial to me in the presence of students I had been working with all summer, and I also felt the larger significance of being—of everything I was there for, all that I was working for, indeed, all that I attempted to introduce into my teaching, all of this that I stood for was being rejected, being denied. And I felt a number of things—shock, humiliation, anger, and I guess a sense of the injustice of it" (A. 253).

The petitioner was further asked whether or not she had familiarized herself with the custom and usage in Hattiesburg of the general white community and specifi-

cally with the custom and usage as to the serving of white persons in the company of Negroes. She stated that she was familiar with such custom and usage. She gave particular attention to the relationship between the Negroes and white community and the custom and usage of the white community toward Negroes in the company of whites and whites in the company of Negroes. She further had occasion to observe personally and to have conversations with others as to the custom and usage in Hattiesburg. She concluded that it was the custom and usage there not to serve white persons in the company of Negroes (A. 254-257).

The petitioner also testified, in the face of the court's statement that such testimony was irrelevant, that there was a policy in Mississippi of "opposition to the mixing of the races" and that the attitude of the community toward persons who "mix with Negroes" is a hostile one. She testified that she had personally observed and experienced this policy (A. 301, 302).

The petitioner testified that she knew of another instance where Negroes and whites together had sought service in a drug store and that the whole group had been barred. She knew, however, of no other instance prior to August 14, 1964, where Negroes were offered service and a white person accompanying them was refused (A. 260). She also testified that she knew of instances of violence in Hattiesburg accompanying the association of whites and Negroes (A. 260).

Despite the custom and usage in the state, the petitioner testified that she thought that when they were in the respondent's establishment they were in one of the places

where the custom had been changed. Accordingly, she thought it would be appropriate for her students and herself to eat there together (A. 266).

Three of the Negro youths who had accompanied Miss Adickes on August 14, 1964, were called as witnesses. The first was Carolyn Moncure who testified that she was seventeen years of age and a freshman at Newcomb College in New Orleans and that she had been one of Miss Adickes' pupils at the Palmer's Crossing freedom school. Under instruction by Miss Adickes she had studied American Negro literature and joined in discussions of civil rights and the Civil Rights Act (A. 269, 270).

There came a time about the first part of August, when Miss Moncure and her fellow students talked about the possibility of going somewhere they had not gone to before the enactment of the Civil Rights Act of 1964. At first they contemplated going to a drive-in movie but decided this was dangerous. Alternatively, they decided to go to the Hattiesburg library. They revealed this determination to their teacher, Miss Adickes, on the Monday or Tuesday before Friday, August 14, 1964 (A. 270). Miss Adickes agreed to accompany the group.

The six Negro students and Miss Adickes left Palmer's Crossing for the half-hour bus trip to Hattiesburg at 11:30 on August 14, 1964. At the library, the group asked for library cards and were refused. Some time later, the Chief of Police came in and told them that the library was being closed (A. 271).

It being lunch time, the group went to Woolworth's; they found the eating place there crowded, so they went to the Kress store. There they found two empty booths and

sat down, three in one booth and four, including Miss Adickes, in the other; Miss Moncure was not in the booth with Miss Adickes. After about ten or fifteen minutes, a waitress came, gave them menus and took the orders in the other booth. Miss Moncure heard one of the girls call to the waitress to take Miss Adickes' order and she heard the waitress say she couldn't serve her because she had instructions from her manager not to serve whites who came in with Negroes. Accordingly, when the waitress came to Miss Moncure's booth, the children there said they didn't want anything either and they all got up and left (A. 271, 272).

Miss Moncure concluded her testimony on direct examination stating that she had seen no one do anything unusual while she was there other than what she described (A. 272).

On cross-examination, Miss Moncure stated that none of the group had anticipated violence or danger because they were dressed alike and that they had so appeared in Hattiesburg before, although not in the company of whites (A. 272). As of the day of their visit to the Kress store, she knew that Negroes had been served food there and she stated that she had previously had a coke there at the lunch counter in the company of Negroes (A. 275).

Miss Moncure further stated that she did not know of any occasion in Hattiesburg when a white person had been refused service, while Negroes accompanying such person had been offered service (A. 277).

Jimmela Stokes was the second Negro student called as witness by the petitioner. Miss Stokes stated that she was eighteen years of age, that she lived in Hattiesburg,

that she was currently a freshman studying sociology at Bishop College in Dallas, Texas, and that she had met Miss Adickes as a student in the freedom school at Palmer's Crossing (A. 278).

Her testimony corroborated that of the petitioner and Miss Moncure in all respects. In the course of her testimony, she said that when the group entered the library she saw a woman behind the library desk, talking on the telephone. The woman hung up as they came in, called another number and said "I need some help down here" Miss Stokes said to the librarian "The White Citizens Council told you not to serve us" and "If we can't use the library, then I don't think anyone should be able to use it." She further stated to the librarian "We'll stay" (A. 279).

At the Kress store, Miss Stokes sat down in a booth with two others and Miss Adickes. After fifteen minutes a waitress came over to take the orders and took all except that of Miss Adickes, whereupon Miss Stokes said "Hey, you forgot one." The waitress said "We are allowed to serve the colored, but not the whites who come in with them." When asked by Miss Adickes if she was refusing service the waitress said she was following the manager's orders because he had told her not to serve the whites who came in with Negroes (A. 280, 281).

In Miss Stokes' opinion, the store was not crowded, nor did anyone in the store do anything out of the ordinary (A. 281).

On cross-examination, Miss Stokes stated that she had previously eaten (she could not remember whether more than once) at the lunch counter in the respondent's Hatties-

burg store, that she had not been refused service but that she had not been with an integrated group. On the past occasion, or occasions, when she had eaten at the counter, the white people would get up and move (A. 281, 282).

On redirect, Miss Stokes testified that on previous occasions there had been a difference in the treatment accorded to her and to white people—that she had had to wait a good while for service, for as long as an hour. The questions which elicited those answers were objected to, the objection sustained and the testimony held to be irrelevant and the jury so instructed. But the testimony was not stricken from the record (A. 284-286).

Miss Stokes also testified on cross-examination that she was aware, on August 14, 1964, that there had been acts of violence in Hattiesburg and that white civil rights workers had been attacked and beaten. She said she knew, in answer to the cross-examiner's question, that "a large part of this [the violence] was directed towards the white civil workers in town in the company of Negroes" (A. 282).

She stated that she didn't, on the present occasion, expect violence and that there was no one inside or outside the Kress store doing anything unusual with respect to the group. Prior to that occasion, Miss Stokes had never been in a group with a white person where the Negroes were offered service and the white person refused (A. 283, 284).

The third Negro student to corroborate Miss Adickes' testimony was Diane Moncure, the sister of Carolyn Moncure. Miss Moncure testified that she was sixteen years of age, that she was a student at the John C. Freemont Senior High School in Los Angeles, California and that

she had met Miss Adickes at the beginning of freedom school on July 6, 1964 (A. 286). Her testimony corroborated that of the petitioner and of the petitioner's two other witnesses in all respects.

Miss Moncure also testified that she saw a police officer enter the store and that he stood and looked at her group as they sat in their places in the booths (A. 291).

Following Miss Diane Moncure's testimony, petitioner's counsel again attempted to bring in further testimony as to the custom and usage in Mississippi on August 14, 1964, by making an offer of proof as to what the two expert witnesses, the benefit of whose testimony she had been denied would testify (A. 293). The proof offered would show that the specific conduct of respondent sprang from the custom and usage against the "mixing"—the integration—of the races and that one way of expressing such custom would be to serve Negroes and refuse service to white persons in the company of Negroes (A. 294, 295).

In the colloquy that followed the court stated:

"You are trying to convert what is an unfortunate situation into the nub of a lawsuit against a party that was just as aware, it seems to me, of the problem. Certainly it hasn't been disputed so far that they were one of the establishments in the community that were, maybe begrudgingly, but trying to comply with the law" (A. 296).

Counsel further stated that one of her proposed experts, Mr. Andrew Gordon, would testify to one kind of discrimination as in the instant case which occurred at a local theatre between July 2, and August 14, 1964, in Hattiesburg (A. 303, 304).

Before resting, the petitioner recalled Miss Carolyn Moncure who stated that she also observed a policeman enter Kress store five minutes after they arrived, pass the group—look back on them and go to the back of the store, come back and then leave (A. 302).

The court adhered to its initial ruling and denied petitioner the benefit of the testimony of the proposed experts [R. 163].

Court Directed Verdict

Thereafter, the court held that the petitioner had not offered any evidence upon which a jury could predicate a finding in her behalf and directed a verdict for the defendant (A. 322).

Summary of Argument

Petitioner, a white school-teacher, sought service in the company of five Negro children at a luncheon booth in the Kress store in Hattiesburg, Mississippi in August, 1964, twelve days after the passage of the Civil Rights Statute (42 U.S.C. 2000 et seq.). The group had just come from the Hattiesburg public library. The children, under escort of their teacher, had requested service there; in response, the librarian had summoned the Police who shut the library and ordered the group to leave. Petitioner was told by a Kress employee that she was being refused service because she, a white, was in the company of "colored." Immediately upon leaving the store, she was arrested by the Police for vagrancy.

Petitioner sued Kress in the United States District Court for the Southern District of New York, pursuant to the

fourteenth amendment and 42 U.S.C. §1983, for damages arising out of the denial of service and for damages arising out of her arrest for vagrancy pursuant, she alleged, to a conspiracy between respondent and the Hattiesburg Police. Petitioner also sought statutory damages for the denial of service under the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335].

After preliminary motions, petitioner was permitted to go to trial only on her cause of action under 42 U.S.C. §1983 for damages arising from respondent's refusal to serve her.

The trial court denied petitioner the use of expert testimony as to the custom of serving whites in the company of Negroes because the identity of the witnesses was not disclosed until one day before trial. At the conclusion of the petitioner's case, the trial court granted a directed verdict on the grounds of her failure to show state action under 42 U.S.C. §1983.

Petitioner asserts that under the law she could show that the deprivation of her constitutional rights had occurred pursuant to "state action" pursuant to enactments by the legislature of the State of Mississippi which supplied "color of law" or pursuant to "custom" and "usage." Initially in her pleadings she alleged both and on the trial she proved both:

1. State action under "color of law" was demonstrated by a joint resolution of the legislature of the State of Mississippi and by a series of state laws enacted after this Court handed down its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In these enactments, the Mississippi legislature urged and required state officials

and private citizens to respect and follow the "segregation laws" of the state.

2. State action was demonstrated by custom and usage prevailing in the state and setting barriers against public acceptance of racially integrated groups. This was shown by testimony at the trial, and the lower court had judicial notice of such custom and usage from contemporaneous decisions of other federal courts sitting on cases arising in Mississippi and involving persons' rights to public accommodation.

Petitioner further contends that passage of the Civil Rights Act of 1964 and its interpretation in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzbach v. McClung*, 379 U.S. 294 (1964) implicitly validated the Civil Rights Act of 1875 and overruled the *Civil Rights Cases*, 109 U.S. 3 (1883) as applied to denial of public accommodations in public eating places in 1964 so that, upon proof, she was entitled to the \$500.00 statutory penalty for respondent's refusal to serve her.

Petitioner further asserts that it was error for the court on the basis of affidavits and unsworn statements, to grant respondent's motion for summary judgment against her complaint alleging conspiracy between respondent and the Police where the circumstances in and of themselves supported the inference of the conspiracy.

Finally petitioner asserts that it was an abuse of discretion for the trial court to deny her the benefit of expert testimony on the crucial issue of custom and usage in Hattiesburg in 1964 where notice of the identity of the witnesses was furnished one day before trial.

ARGUMENT

POINT I

Denial of the right of public accommodation to petitioner because she, a white, was in the company of Negroes was under color of law and constituted a violation of the fourteenth amendment and of 42 U.S.C. §1983.

The discriminatory refusal of the waitress to serve petitioner because she, a white person, was in the company of Negroes constitutes a deprivation of her rights to be served at a booth at a public lunch counter—a right secured by the constitution under the fourteenth amendment and 42 U.S.C. §1983, which provides:

“Civil action for deprivation of rights

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Petitioner maintains that the refusal to serve her was both “under color” of a state “statute” and also pursuant the “custom” and “usage” in Mississippi against the mixing of the races in public places; she maintains, further,

that the evidence she presented at the trial bore out such contention.⁴

Under this point, however, she will argue that legislation enacted by the Mississippi legislature, in apparent response to this Court's desegregation rulings in *Brown v. Board of Education*, 347 U.S. 483 (1954), was sufficient in and of itself to constitute the "statute," "ordinance" or "regulation" specified in §1983.

Attached to petitioner's proposed amended complaint were sections of the Mississippi Code in effect in 1964—these being: Chapter 466, Senate Concurrent Resolution No. 125 (1956); Mississippi Code Section 4065.3 (1956) condemning and protesting the decisions of this Court on integration and deploring all similar decisions as being in violation of the Constitution of the United States and the State of Mississippi and declaring them to be of "no lawful effect," and directing officials of the state to prohibit "mixing" or integration of the white and Negro races in public places of amusement, recreation or assembly in the state; Mississippi Code Section 2056(7) (1954) which made it a crime to conspire "to overthrow or violate the segregation laws of this State," and Mississippi Code Section 2046.5 (1956) which expressly permits a proprietor of a lunch counter to refuse service to anyone at his option. The section defines as criminal trespass any refusal to leave the premises on the part of a person asked to leave (A. 169,177).

⁴ Petitioner will argue, *infra*, that she was unduly restricted in her proof by erroneous pre-trial rulings of the lower court as developed by Judge Waterman in his dissent in the court below. She contends, nonetheless, that even as limited, the proof adduced at trial of an evidentiary nature and that which the court was asked to judicially notice supported the allegations of her complaint and made out a *prima facie* case under 42 U.S.C. §1983.

On respondent's motion for summary judgment, Judge Bonsal in the District Court upheld petitioner's first cause of action but on the narrow ground that only one of the Mississippi legislative actions was pertinent—§2046.5. In fact, in subsequent rulings, Judge Bonsal denied petitioner the right to attach to her complaint *in haec verba* the other legislative provisions in support of her contention that her deprivation of rights was supported by state legislation (A. 185). This denial underscores the lower court's rejection of the amply documented fact that racial segregation is supported as a state policy in Mississippi by action of the state's legislature.

Judge Bonsal further confused the requirements of §1983 as to "custom" and state action, reading the federal law to mean that any custom must be enforced by state legislative action to give rise to a cause of action—viz:

"Therefore, if plaintiff can show the defendant discriminated against her pursuant to a custom enforced by the State under Mississippi Code, §2046.5, of refusing service to whites in the company of Negroes, she will satisfy the state action requirement of 42 U.S.C. §1983" (A. 183).

The court below similarly disregarded the overall pattern of legislative support for segregation in the state when it said:

"However, these 1956 enactments are clearly insufficient by themselves to prove that in 1964 Mississippi had a custom of separating the races in restaurants. *Williams v. Howard Johnson's Inc.*, 323 F. 2d 102, 106 (4th Cir. 1963); comment, 50 Cornell L.Q. 473, 494 (1965). The trespass statute, Mississippi Code §2046.4

is the only enactment not dealing with school integration and it, by itself, sheds no light on Mississippi customs and usages" (A. 206).

The court below, having arbitrarily dismissed the application of other Mississippi law urged by petitioner, found that the Mississippi criminal trespass law (§2046.5) was insufficient to support state action and in no way "encouraged the discrimination practiced by Kress" (A. 209). This holding involves a narrow construction of this Court's ruling in *Reitman v. Mulkey*, 387 U.S. 369 (1967), and is at variance with the meaning given to state action both by the proponents of this and similar legislation in the Reconstruction Congress⁵ and with the trend of the opinions of this Court in recent years. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); *United States v. Price*, 383 U.S. 787 [See footnote pp. 794, 795] (1966); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Griffin v. Maryland*, 378 U.S. 130 (1964); cf. *Garner v. Louisiana*, 368 U.S. 157 (1961); W. Van Alstyne and K. Karst, "State Action and the National Interest in Racial Equality", 17 Stan. L. Rev. 3, 4 (1961); Lang "State Action and the Scope of Private Choice," 50 Cornell Q., 473 (1965). J. Silard, "A Constitutional Forecast: Demise of the 'State Action' Limit on the Equal Protection Guarantee," 66 Col. L.R., 855 (1966).

⁵ Language in the debates supporting the affirmative duty of the federal government through legislation to implement the thirteenth, fourteenth and fifteenth amendments is voluminous. See "The Reconstruction Amendments' Debates, as republished by the Virginia Commission on Constitutional Government (1967), pp. 494, 495, 496, 497, 502, 503, 511. Also see A. Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers L.R. (1967) 387, 394-396. J. Ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951), pp. 166-171.

This Court held in *Reitman*, following the reasoning of the California Supreme Court, that it will examine a state legislative action (there a state constitutional amendment) in terms of its immediate objective, its ultimate effect and its historical context and the conditions existing prior to its enactment, and struck down that state action which it found to be affirmatively designed to make private discrimination legally possible.

The court below distinguished the Mississippi Code sections as 1.) not a constitutional provision so not embodied in the state's "basic charter" and 2.) a mere neutral restatement of the common law allowing a restaurateur to serve whomever he pleases.

Against the dubious reasoning that led the Second Circuit to these findings, the dissent of Judge Waterman provides a careful analysis of common law concepts that erases the pedantic distinction between "innkeeper" and "victualler" and shows that a restaurateur under common law has an obligation to serve all comers (A. 222-224). Blackstone Commentaries 164 (Lewis ed., 1902) at 166. Furthermore, petitioner submits, the immediate historical record denies the comfortable finding of "neutrality" by the Second Circuit: Mississippi §2046.5 and the other legislation cited *supra*, were adopted by the state legislature after the decision by this Court in *Brown v. Board of Education*, *supra*, and are referred to as the "segregation laws of the state." Compare C. L. Black, "Foreword: State Action, Equal Protection and California Proposition 13," 81 H.L.R. 69 (1967); *Hunter v. Erickson*, Jan. 20, 1969, — U.S. —, 37 L.W. 4091.

Subsequent to Judge Bonsal's ruling and to trial of this case, but prior to the decision of the court below, the Court of Appeals for the Fifth Circuit had occasion to rule

on the facts in the instant case. *Achtenberg, Adickes, et al. v. State of Mississippi*, 393 F. 2d 468 (Feb. 5, 1968). Before that court petitioner sought removal (from state to federal jurisdiction under 28 U.S.C. §1443) of the trial of the charge of vagrancy brought against her after her arrest immediately upon her departure from the respondent's store. She sought such removal on the ground that the Mississippi vagrancy statute was being used to punish her for the exercise of rights declared in the Civil Rights Statute of 1964.

"These petitions for removal together with the affidavits, clearly support the allegations in the petition that the conduct which caused the arrest of these five persons under the vagrancy statutes or ordinances of the state of Mississippi or the city of Hattiesburg, was conduct which was clearly protected under the provisions of Section 201 of the Civil Rights Act of 1964; attempts to enjoy equal public accommodations in the Hattiesburg City Library [The evidence shows that the Hattiesburg City Library was supported by city funds and that there was a policy of restricting it to white persons. It was thus an 'establishment or place' where 'such discrimination or segregation is or purports to be required by (a) law, statute, ordinance, regulation, rule, or order (of) State, agency or political subdivision there.' 42 U.S.C.A. §2000a-1, §202 Civil Rights Act, 1964.] and a restaurant in the nationally known Kress store."

That court held:

"Here, the movants [petitioner Adickes was one of five] alleged in their petition for removal, and proved on the hearing on the motion for removal, that they

were arrested for attempting to exercise the rights granted them under Section 201 of the Civil Rights Act of 1964 ... the evidence being undisputed that the appellants were being prosecuted in violation of the express prohibitions of Section 203 of the Civil Rights Act for rights granted them under Section 201, the trial court should have dismissed the state prosecutions under the principle announced by The Supreme Court in *State of Georgia v. Rachel* [384 U.S. 808 (1966)]." pp. 474, 475.

These same facts were available to the trial courts below; those courts chose, however, to disregard the plain significance of these facts as set out by the Fifth Circuit.

POINT II

Denial of the right of public accommodation to petitioner because she, a white, was in the company of Negroes was pursuant to "custom" and "usage" and constituted a violation of the fourteenth amendment and of 42 U.S.C. §1983.

Judge Bonsal in his preliminary ruling on respondent's motion for summary judgment defined the "custom" involved in the case at bar as one, "of refusing service to whites in the company of Negroes" (A. 183). Petitioner contended below that the action of refusing service to a white person was an expression of a custom and usage prevailing in the State of Mississippi against the "mixing" or integration of black and white skinned persons in public.

Judge Bonsal held that plaintiff could prevail at trial if she could "show the defendant discriminated against her pursuant to a custom enforced by the State under Missis-